THE TACTICS OF DOJ'S REQUEST FOR A PARTIAL STAY OF JUDGE CANNON'S ORDER

I was out when DOJ submitted a series of documents in Trump's demand for a Special Master. As I'm sure you've heard, the government has informed Judge Cannon they will appeal at least some of her decision, but at this point are asking only for a partial stay of her injunction against using the seized classified records for further criminal investigation.

I take this to be a tactical effort, one designed to make Cannon and Trump's position less tenable going forward, without any guarantee that Cannon will accede to this request (and I think the request faces even odds at best).

DOJ submitted the following documents.

- A notice of appeal to the 11th Circuit
- A motion for a partial stay pending appeal (allowing the FBI to use the 103 documents marked as classified for further criminal investigation)
- A declaration from FBI Assistant Director Alan Kohler, explaining why one cannot sever the criminal investigation from the damage assessment
- A motion to unseal the privilege review status report (but not two

appendices)
- A notice of appearance by Anthony Lacosta, who is leading the privilege review

In this post, I'll attempt to explain why, while the motion for a partial stay may not work, it likely will improve DOJ's tactical position going forward. There are other parts of this that, I think, are tactical as well. But the main point seems to be to force her to heighten her already egregious stance before DOJ is forced to appeal this.

As I said above, I think DOJ intends the motion for a partial stay to be tactical. I think there's at least an even chance that Judge Cannon will reject it. If she does, DOJ has told her they will appeal a week from today. As I understand it, that will be a motion for a stay which is separate from the appeal of her ruling more generally, but the 11th Circuit would see the substance of it first. And however batshit the 11th Circuit and SCOTUS judges were who might review it, its substance would be something really modest: That the Executive Branch owns the country's secrets and needs to protect them.

Plus, SCOTUS has already — in Trump v. Thompson — upheld Executive Privilege assertions less modest than the substance of the stay pending appeal. DOJ might not succeed at the 11th, but they have a good chance of succeeding at SCOTUS, and doing so on accelerated timeframe (in significant part because they are making a credible claim of urgent injury). They've narrowed the issue to one they need to reach to be able to investigate stolen classified documents.

The only principle DOJ is asserting in this motion for a stay is that the Executive Branch owns classified information. As I laid out here, Cannon based her decision to butt in on a (largely specious) claim that Trump had personal items included in the seized records. By asking

only for a stay for all classified records, the government narrows its *Richey* argument, noting that Trump cannot own any documents marked as classified.

> The second and third factors likewise counsel against exercising equitable jurisdiction with respect to the classified records. Those factors apply only to "the material whose return [the plaintiff] seeks" and to injury resulting from "denial of the return of his property." Richey, 515 F.2d at 1243. Plaintiff, however, has no right to the "return" of classified records, which are not "his" property. Id. Classified records also are not "personal" to Plaintiff and would not reveal any sensitive personal information. D.E. 64 at 9, 21. Accordingly, Plaintiff has no cognizable "individual" interest in any classified records (or in having a special master review those records), and he cannot be "irreparably injured" if such records are not returned to him. Richey, 515 F.2d at 1243. The Court's determination that the second and third Richey factors favored the exercise of equitable jurisdiction relied on its finding that Plaintiff had an interest in "at least a portion" of the seized records, including "medical documents, correspondence related to taxes," "accounting information," and "material potentially subject to attorney-client privilege," and that identification of such materials "cannot reasonably be determined at this time." D.E. 64 at 9.2 But that rationale is categorically inapplicable to the classified records at issue in this motion, which are easily identifiable by their markings, are already segregated from the other seized records, and do not include personal records or potentially privileged communications with his personal attorneys.

Cannon may still not budge! But if she doesn't, it'll make the outrageousness of her decision all the more evident, and indefensible.

But even this modest request will cause Trump — and therefore Judge Cannon — a good deal of concern.

Trump has already opposed this motion. (Zoe Tillman emphasized this on Twitter.)

> Counsel for the United States has conferred with counsel for Plaintiff, and Plaintiff opposes the government's motion.

Most notably, it does not concede the import of timely criminal investigation. Without addressing Cannon's claims to the contrary, the government argued that the single possible injury Trump might face with the sharing of classified records he doesn't own is in the continuation of the investigation itself.

> Plaintiff's only possible "injury" relates to the government's investigation itself, but that injury is not legally cognizable. As the Supreme Court has made clear, "the cost, anxiety, and inconvenience of having to defend against" potential criminal prosecution cannot "by themselves be considered 'irreparable' in the special legal sense of that term." Younger v. Harris, 401 U.S. 37, 46 (1971); cf. Cobbledick, 309 U.S. at 325 ("Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship."). That is why courts have exercised great caution before interfering through civil actions with criminal investigations or pending cases. See also Deaver v. Seymour, 822 F.2d 66, 69-71 (D.C. Cir. 1987) (applying Younger's principles with regard to potential federal charges);

> Ramsden v. United States, 2 F.3d 322, 326 (9th Cir. 1993) ("The mere threat of prosecution is not sufficient to constitute irreparable harm."). And those fundamental principles strongly support the limited stay the government seeks here.

It noted that it cannot investigate 18 USC 793 (or obstruction of an investigation into that crime) without the classified documents in question.

> This case does not involve a pending trial, but the need for the classified records is even more clearly demonstrated and specific here: The government is investigating potential violations of 18 U.S.C. § 793(e), which prohibits unauthorized retention of national defense information. The classified records are not merely relevant evidence; they are the very objects of the relevant criminal statute. Similarly, the government is investigating the adequacy of the response to a grand jury subpoena for all documents in Plaintiff's possession "bearing classification markings." D.E. 48 Attachment C. Again, the seized classified records at issue here—each of which the subpoena plainly encompassed—are central to that investigation.

It also talked about FBI's central role in investigating those 90 empty folders for classified or staff secretary information.

> The same is true of the empty folders with "'classified' banners" that were among the seized materials here, see D.E. 39-1: The FBI would be chiefly responsible for investigating what materials may have once been stored in these folders and whether they may have

> been lost or compromised—steps that, again, may require the use of grand jury subpoenas, search warrants, and other criminal investigative tools and could lead to evidence that would also be highly relevant to advancing the criminal investigation.

The government also pointed out the illogic of Cannon's concession that the Executive has urgent need to conduct its damage review, while unilaterally deciding that they cannot conduct a criminal investigation.

> The Court appeared to recognize that a sufficient showing of need can overcome potential assertions of executive privilege by specifying that the government may continue to review and use the classified records in its classification review and national security risk assessment. D.E. 64 at 22-24. That aspect of the order reflects an implicit determination that no potential assertion of executive privilege by Plaintiff could justify preventing the Executive Branch from conducting that review and assessment of the classified records. But under United States v. Nixon, the same is true of the review and use of the information by the government in an ongoing criminal investigation. And it would be especially unwarranted to prohibit that review and use while authorizing other personnel in the Executive Branch to review and use the same information:

All these things are likely to cause her heartburn — and Trump even more! In her opinion last week, Cannon at first denied she was minimizing the import of an ongoing criminal investigation — but then dismissed precedent on the problems with doing that.

> None of this should be read to minimize

> the importance of investigating criminal activity or to indicate anything about the merits of any future court proceeding.
>
> [snip]
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> The Court is mindful that restraints on criminal prosecutions are disfavored21 but finds that these unprecedented circumstances call for a brief pause to allow for neutral, third-party review to ensure a just process with adequate safeguards.
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> 21 See Younger v. Harris, 401 U.S. 37, 43–44 (1971) ("[C]ourts of equity should not . . . act to restrain a criminal prosecution[] when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."); Stefanelli v. Minard, 342 U.S. 117, 120 (1951) (explaining that "[t]he maxim that equity will not enjoin a criminal prosecution" applies with greatest force in the context of the federal government interfering with state prosecutions).

If she refuses to let DOJ continue its investigation, which I think is quite possible, it'll make her intent in objecting — halting any criminal investigation, into Trump or anyone else — all the more clear.

And this motion affirms that the investigation will continue regardless of what Cannon decides (though establishes how much her order is impeding it).

> For example, the government does not understand the Court's injunction against the government's review and use of seized materials for criminal investigative purposes to prevent it from questioning witnesses and obtaining evidence about issues such as how classified records in general were moved

> from the White House, how they were subsequently stored, and what steps Plaintiff and his representatives took in response to the May 11, 2022 grand jury subpoena. The government also does not understand the Order to bar it from asking witnesses about any recollections they may have of classified records, so long as the government does not use the content of seized classified records to question witnesses (which the Order appears to prohibit).5 Even so, the prohibition on the review and use of the classified records is uniquely harmful here, where the criminal investigation concerns the retention and handling of those very records, with the concomitant national-security concerns raised by that conduct.

She's on notice now that she has not succeeded in killing the investigation. She may take further steps to do so, but those, too, would be all the more outrageous if she did.

Finally, and perhaps most effectively, DOJ implies they intend to brief Congress on what Trump stole.

> The government also does not understand the Court's Order to bar DOJ, FBI, and ODNI from briefing Congressional leaders with intelligence oversight responsibilities regarding the classified records that were recovered. The government similarly does not understand the Order to restrict senior DOJ and FBI officials, who have supervisory responsibilities regarding the criminal investigation, from reviewing those records in preparation for such a briefing.

All the Republican members of the Gang of Eight have demanded such briefing, so it'd be hard for them to refuse to receive it. But my guess is

this would badly discredit Cannon's effort to thwart the investigation into Donald Trump.

To refuse this order, Aileen Cannon is going to have to assert that the Federal Government doesn't own its secrets. I don't rule out that she'll do so. But if she does, it'll make an appeal far more modest, and her malign intent far more obvious.

Update: Attempted to correct the relationship between the appeal of a stay and the appeal proper.