PERFECT SPECIMEN: GOVERNMENT RECORDS ABOUT THE MAZARS LAWSUIT AND TRUMP'S COVID TREATMENT WOULD BE GOVERNMENT RECORDS

In her opinion appointing a Special Master in the Trump stolen document case, Judge Aileen Cannon yoked a description of still-sealed information that appears in the privilege review status report to two unrelated mentions about personal effects.

> The second factor—whether the movant has an individual interest in and need for the seized property—weighs in favor of entertaining Plaintiff's requests. **According to the Privilege Review Team's Report**, the seized materials include medical documents, correspondence related to taxes, and accounting information [ECF No. 40-2; see also ECF No. 48 p. 18 (conceding that Plaintiff "may have a property interest in his personal effects")]. The Government also has acknowledged that it seized some "[p]ersonal effects without evidentiary value" and, by its own estimation, upwards of 500 pages of material potentially subject to attorney-client privilege [ECF No. 48 p. 16; ECF No. 40 p. 2]. [my emphasis]

As I laid out here, this passage was shamelessly dishonest. That's because she treated a subjunctive description of what the government would do *if* they found "personal effects without evidentiary value" as a concession that they *had* found such personal effects (in the government's

response she was mangling, they explained why the passports they had already returned to Trump *did* have evidentiary value). And she double counted materials: she treated the 520 pages of potentially privileged material as a separate item from the references to "medical documents, correspondence related to taxes, and accounting information," even though those medical and tax documents were in the potentially privileged bucket.

Nowhere in this otherwise dishonest passage, though, did Aileen Cannon claim that the, "medical documents, correspondence related to taxes, and accounting information" were Trump's own personal documents.

Even Trump, when he tweeted about this, stopped short of claiming these were all documents he owned (though he did claim they had taken "personal Tax Records").

Nevertheless Cannon's dishonest reference, yoked as it is to two unrelated references to personal effects, has led people to believe that the medical and tax records on which Cannon based her entire decision to butt into this matter *are the personal possessions* of Donald Trump.

There is no evidence that's the case, and lots of reason to believe it's not.

That's true, first of all, because unlike the description of the contents of boxes sent to NARA in January (which were described to include

"personal records [and] post-presidential records," the detailed inventory of boxes taken on August 8 doesn't include such a description.

To be sure: The FBI *did* seize personal documents. The government's motion for a stay — written by people who have not seen the materials that Cannon describes as medical and tax records — acknowledges personal records.

> Among other things, the government's upcoming filing will confirm that it plans to make available to Plaintiff copies of all unclassified documents recovered during the search—both personal records and government records—and that the government will return Plaintiff's personal items that were not commingled with classified records and thus are of likely diminished evidentiary value.

There *are* personal records: for example, the FBI seized 1,673 press clippings, with a bunch — dated 1995, 2008, 2015, and 2016 — pre-dating Trump's Presidency, though five of the boxes with some clippings that pre-date Trump's presidency include documents marked as classified, including one box (A-15) with 32 Secret and Confidential documents, and another (A-14) with a Top Secret document. But when it discusses returning things, it discusses "items." Those personal items likely include the 19 pieces of clothing or gifts on the inventory (though some of the gifts, if they're from foreign entities, belong to the US). They also likely include the 33 books that were seized, with 23 seized in one box that contained no documents marked as classified.

The government may be generously agreeing to return a carton of Donny Jr's shitty books!

And there will be Trump notes. Some of the notes likely *will* count as personal records under the Presidential Records Act, which include:

> A) diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;
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> (B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and
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> (C) materials relating exclusively to the President's own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

But some will be presidential records (those may be some of the most interesting fights going forward and it's the logic Tom Fitton used to push Trump to challenge the seizure of his records). Some of the notes will also be shown to include information otherwise treated as classified.

But the medical and tax records cannot be included among the items referred to here, because Jay Bratt, who wrote the government motion, *has not seen* the records that include medical and tax records, because they are in the potentially privileged bucket. And among those materials, there's likely to be fewer such personal records (aside from clippings).

Here are the six inventory items that, based on this Fox report and reading the two inventories together, were initially treated as potentially privileged (two sets of documents have since been added).

Item	Box Number	Privileged	Classified	Clippings	Clippings start	Clippings end	Contents	TS	Secret	Confidential	W/O
33	A-33	X		83	2/2017	2/2018					44
31	A-43	X		111	6/2015	4/2019					41
29	A-14	X	X	86	10/1995	5/2019		1			35
32	A-13	X		94	2/2008	4/2020					88
30	A-26	X		29	5/2020	9/2020					82
4	Documents	X	X	26	1/2020	11/2020			1	1	357

Of those, Item 4 on the inventory, described only as "documents" and elsewhere sourced to desk(s) in Trump's office, makes up over half the records seized in the potentially privileged bucket (leaving aside clippings). It primarily consists of 357 government documents without classification marks.

26 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2020-11/2020
1 US Government Document with CONFIDENTIAL Classification Markings
1 US Government Documents with SECRET Classification Markings
357 US Government Documents/Photographs without Classification Markings

Notwithstanding that this set of documents originally included Trump's passports (which are legally government documents), it makes sense that even if there were other boxes that included the stray personal correspondence, this one did not. That's because these were items taken out of Trump's desk, not a box taken with all its contents. This set of documents, of which just a fraction could have since been deemed potentially privileged (because there are only 64 sets of potentially privileged documents), is also the set on which the privilege team would have focused most attention on the day of the search.

The privilege team was there, in Trump's office, to weed out really obviously sensitive documents.

Plus, there are ready explanations for what kinds of government documents might include, "medical documents, correspondence related to taxes, and accounting information."

First, as President, Trump had a White House physician. White House physician Ronny Jackson's records of his ties to Trump would amount to government records. Even the paperwork behind this famously batshit press conference would be government records — and it might explain why Trump proclaimed (in his Tweet) that these records would prove he was a "Perfect Specimen."

But there are other medical records that Trump might be more likely to stash in his desk drawer, which might also involve lawyers: his COVID diagnosis (and the reckless decision to attend a presidential debate, exposing Joe Biden to the disease), any assumption of Presidential duties by Mike Pence, the infection of numerous people with COVID at the Amy Coney Barrett roll-out, the Secret Service fly-by when Trump returned to the White House, and the decision to seek FDA approval for his access to Regeneron. The records relating to Trump's bout with COVID by itself could fill a box. And they're the kind of records that he would — indeed, already has — fought hard to keep from public dissemination.

Similarly, there are known documents that generated reams of government records pertaining to, "correspondence related to taxes, and accounting information." Two involve the various efforts to obtain Trump's tax returns from his accounting firm, Mazars, and extended efforts to investigate Trump Organization's violation of the emoluments clause with Trump International Hotel.

This OLC memo ruling that the Treasury Department should blow off the House Ways and Means Committee request for Trump's tax returns relates to taxes. This DOJ amicus brief weighing in on the same fight is a government document about taxes and accounting information. All correspondence generating the documents, too, would relate to taxes and accounting information. All would be government documents. Lawyers would have been involved in all parts of the process. All are the kinds of records Trump might stash in his desk drawer and refuse to turn over.

Similarly, this IG Report describes how the General Services Administration ignored how the Emoluments Clause should impact concerns about management of the Old Post Office. The Report

itself references both lease (that is, accounting) information and redacted discussions among GSA and other lawyers. It discusses inadequate efforts after the inauguration to shield Trump from management of the hotel, including several discussions of lawyers for Trump Org and his spawn. It's a government document. It — and all the legal correspondence and lease information it references — would become government documents. It's another example of the kind of thing that would be a government record addressing accounting records that nevertheless might trigger privilege concerns.

I'm not saying these *are* the records at issue. I'm saying there's a long list of known squabbles that would 1) consist of government records 2) involve tons of lawyering 3) would be the kind of thing Trump would want to hoard, and 4) would fit the low standard of potentially privileged as described by the filter lawyers.

There's one more reason — besides her false treatment of a subjunctive consideration as a concession and her double counting — to suspect that Cannon created a deliberate misunderstanding that these were documents belonging to the former President: The emphasis with which filter attorney Anthony Lacosta focus on her unilateral treatment of still-sealed information in their motion to unseal their status report. The motion describes two ways in which details from the still-sealed filter team report were made public: First, after asking permission to do so and getting the assent of Trump lawyer Jim Trusty, filter attorney Benjamin Hawk described the filter process. Then, without unsealing the report, Cannon's several references to the still-sealed report in her own opinion. With two of those references (page 15 and footnote 13 on the same page), Cannon described investigative agents finding something that might be privileged and turning it over immediately to the filter team.

> To begin, the Government's argument

> assumes that the Privilege Review Team's initial screening for potentially privileged material was sufficient, yet there is evidence from which to call that premise into question here. See In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means, 11 F.4th at 1249–51; see also Abbell, 914 F. Supp. at 520 (appointing a special master even after the government's taint attorney already had reviewed the seized material). As reflected in the Privilege Review Team's Report, the Investigative Team already has been exposed to potentially privileged material. Without delving into specifics, the Privilege Review Team's Report references at least two instances in which members of the Investigative Team were exposed to material that was then delivered to the Privilege Review Team and, following another review, designated as potentially privileged material [ECF No. 40 p. 6]. Those instances alone, even if entirely inadvertent, yield questions about the adequacy of the filter review process.13
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> 13 In explaining these incidents at the hearing, counsel from the Privilege Review Team characterized them as examples of the filter process working. The Court is not so sure. These instances certainly are demonstrative of integrity on the part of the Investigative Team members who returned the potentially privileged material. But they also indicate that, on more than one occasion, the Privilege Review Team's initial screening failed to identify potentially privileged material. The Government's other explanation—that these instances were the result of adopting an over-inclusive view of potentially privileged material out of an abundance of caution—does not

> satisfy the Court either. Even accepting the Government's untested premise, the use of a broad standard for potentially privileged material does not explain how qualifying material ended up in the hands of the Investigative Team. Perhaps most concerning, the Filter Review Team's Report does not indicate that any steps were taken after these instances of exposure to wall off the two tainted members of the Investigation Team [see ECF No. 40]. In sum, without drawing inferences, there is a basis on this record to question how materials passed through the screening process, further underscoring the importance of procedural safeguards and an additional layer of review. See, e.g., In re Grand Jury Subpoenas, 454 F.3d 511, 523 (6th Cir. 2006) ("In United States v. Noriega, 764 F. Supp. 1480 (S.D. Fla. 1991), for instance, the government's taint team missed a document obviously protected by attorney-client privilege, by turning over tapes of attorney-client conversations to members of the investigating team. This Noriega incident points to an obvious flaw in the taint team procedure: the government's fox is left in charge of the appellants' henhouse, and may err by neglect or malice, as well as by honest differences of opinion.").

As Hawk explained (and she ignored) in the hearing, one of these instances involved nothing more than seeing the name of a law firm. The second he struggled to explain, but it was clear he *really* doesn't think it's privileged.

> In the second instance, Your Honor, again, I think this is being personally over inclusive in an abundance of caution recognizing the circumstances that we find ourselves in, the second instance was again an item generally

> speaking — Your Honor, if you can give me a moment just to think on how to frame this.
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> The second instance was an item where a case team attorney saw that there might be — saw that there might be — saw that there were — bottom line is, Your Honor, I do not believe this information is privileged, but I still want to be respectful, and I want respect the process and Counsel's opportunity to assert, but it was an instance where, I believe in my view, the case team attorney was exercising extreme caution in identifying a document that could potentially include privileged information and so, exercising that caution, gave it to the case team — or gave it to privilege review team to review, and that Your Honor, as counsel —

And while Hawk doesn't directly address it, another place where Aileen Cannon unilaterally used information from the privilege review team report is in her claim that there were medical and tax records in the seized materials (see the bolded attribution, above).

Lacosta points to Judge Cannon's asymmetrical reliance on this information in his motion to unseal the report.

> Here, there is no compelling interest in maintaining the sealed status of the Filter Notice in this case, particularly in light of the Court's reference to it in the Court's Order appointing a special master. (DE:64 at 6, 15, & n.13.) Moreover, the United States has an interest in the Filter Notice being a part of the public record in this case and thereby equally available to all of the litigants in this matter.

This is a very subtle way of saying that for Bratt to litigate this issue, he needs to have the same information that both Trusty and Cannon are exploiting in their arguments. And, frankly, the public does too, because Cannon is quite clearly flipping normal investigative procedure on its head (again), granting the former President privileges that no criminal suspect in the United States gets.

Judge Cannon has, explicitly, turned the diligence of the investigative team into proof of harm. And because she has engaged in that kind of dishonesty, and because her reference to medical and tax records not only *doesn't* deny these are government records, but also accompanies two other dishonest claims (the double counting and the treatment of a subjunctive statement as a concession), we should be very wary to read this claim as anything other than the public record suggests: that these are government records that involve some legal dispute.

Trump chose to use the levers of government to gain financial advantage and because of that there are years and years of government documents that involve legal disputes about his own personal and corporate finances. It should not surprise anyone that some of those materials were in boxes at Mar-a-Lago or stashed in his desk drawer. They are among the secrets he has most jealously guarded.

And unless and until Judge Cannon unseals that report about which she and Trump made asymmetric claims, we should not assume good faith on her part.

Update: Given Peterr's question about my comment about notes, I elaborated on what I meant and the standard for personal notes under the Presidential Records Act.