

DOJ HAS AT LEAST ONE CARD LEFT TO PLAY: CONGRESS' INSTINCT FOR SELF- PRESERVATION

Last night, Trump and DOJ submitted their competing plans for a Special Master to Judge Aileen Cannon. As I laid out, Trump's plan is a transparent effort to stall the entire investigation for at least three months, and after that to bottle up documents he stole – those with classified markings and those without – at NARA, where he'll launch new legal fights in DC to prevent further access.

Judge Cannon has ordered Trump to weigh in on the government's motion for a partial stay of her order, asking her to permit the investigative team access to any documents marked as classified, by 10AM on Monday. Trump will object for the same insane logic he gave in his Special Master proposal: That if he can get a private citizen Special Master to override the government's classification determination, then he can declare the documents – even Agency documents that would be government, not Presidential Records – part of his own records at NARA.

Because Trump didn't share his choices until after close of business day on Friday, both sides also have to inform her what they think of the other's Special Master suggestions – Barbara Jones (who was Special Master for the review of both Rudy Giuliani's and Michael Cohen's devices) and retired George W. Bush appellate judge Thomas Griffith for the government, and retired EDNY and FISC judge Raymond Dearie and GOP partisan lawyer Paul Huck Jr for Trump – on Monday.

Then, if Cannon has not relented on the

investigative side for documents marked as classified by Thursday, DOJ will ask for a stay of that part of her decision from the 11th Circuit, pending the rest of their appeal (the scope of which remains unknown and may depend on her other decisions this week).

Cannon's decision on whether to permit investigators to access the documents marked as classified may provide the government leverage over the Special Master choice, which could create new bases for appeal. None of the choices for Special Master are known to be cleared, much less at the TS/SCI levels that would be needed to review the documents Trump stole, though Dearie, who was on FISC as recently as 2019, surely would be easily cleared as such.

That doesn't matter for the government's preferred approach. The Special Master won't *get* any known classified document under their approach.

They would, however, under Trump's approach (which more closely matches Cannon's current order). And so DOJ will have to agree to give clearance to whatever person ends up as Special Master under the Trump plan.

The same Supreme Court precedent that undergirds all these arguments about classification authority, *Navy v. Egan*, is *specifically* a ruling about the Executive's authority to grant or deny clearances. The government could deny any of the proposed Special Masters clearance – and might well do so, to deny Huck access. Likewise, the government might well deny Trump's lawyers (at least Evan Corcoran, who is likely either a witness or subject of the obstruction side of the investigation) clearance for such a review as well.

So if Cannon doesn't grant the government's motion for a stay, then she effectively gives the government several more levers over her control of the Special Master process.

She probably doesn't give a damn.

There are two other developments we might expect this week, though.

First, last Wednesday, DOJ asked and Chief Judge Beryl Howell granted permission to unseal the parts of the search warrant affidavit mentioning the same two grand jury subpoenas that she unsealed for mention in DOJ's response to Trump's Special Master motion. (I'm looking for the person I owe a hat-tip to this for.) Since receiving that permission, DOJ has not yet gone back to Magistrate Judge Bruce Reinhart to request further unsealing of the affidavit; there's not even the tell-tale sealed filings in the docket that ended up being prior such requests.

If and when DOJ does ask for further unsealing, it might reveal more information about Trump's actions – and, importantly for the question of who can be cleared for the Special Master review, Evan Corcoran's. There are several entirely redacted paragraphs that likely tell what happened in response to the May 11 subpoena. There's also a likely detailed discussion of the probable cause that Trump – and others – obstructed the investigation, some of which could be unsealed with mention of the surveillance video.

The government response before Cannon didn't address the evidence of obstruction (or the June 24 subpoena) in much detail. Simply unsealing references of that subpoena in the affidavit might provide more damning information about Trump's efforts to hide classified documents from DOJ.

More importantly, on Tuesday, the House returns from August recess. It'll be the first time since the search that both houses of Congress are in town. And in their Motion for a Stay, the government noted (and Judge Cannon did not object) that it did not understand Cannon's order to prohibit a briefing to "Congressional leaders with intelligence oversight responsibilities."

5 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.

This seems to telegraph that DOJ plans to brief the Gang of Eight – which includes Nancy Pelosi, Adam Schiff, Kevin McCarthy, Mike Turner, Chuck Schumer, Mark Warner, Mitch McConnell, and Marco Rubio – about what documents Trump stole, possibly this week. Turner and to a lesser degree Rubio have been demanding such a briefing.

And at a minimum, after such a briefing you'd see everyone run to the press and express their opinions about the gravity of Trump's actions. Because neither DOJ nor Aileen Cannon can prevent these members of Congress from sharing details about these briefings (especially if they're not classified), you should be unsurprised everyone to provide details of what Trump stole.

That might devolve into a matter of partisan bickering. But two things might moderate such bickering. First, Marco Rubio is on the ballot in November, and Val Demings has already criticized his knee-jerk defense of Trump.

Just as importantly, Mitch McConnell, who badly would like to prevent Democrats from expanding their majority in the Senate and just as badly would like the MAGA Republicans to go away, really doesn't want to spend the next two months dodging questions about Trump's crimes.

If not for Trump's demand for a Special Master,

DOJ likely would have put its head down and mentioned nothing of this investigation until after the election. But by demanding one – and by making such unreasonable requests – Trump has ensured that the investigation into his suspected violations of the Espionage Act and obstruction will dominate the news for at least a few more weeks.

Even if DOJ doesn't brief the Gang of Eight, even if that doesn't lead to damning new details and recriminations from being made public, the public nature of the Special Master fight will suck all the oxygen out of the next few weeks of campaign season, at least, just as it contributed to Joe Biden enjoying one of the most positive mid-term Augusts for any President in the last half-century.

But if new specifics about Trump's negligence and efforts to obstruct the investigation are made public, then November's election will be precisely what Republicans are trying to avoid it being: not just a response to the Dobbs ruling overturning protection for abortion access, but a referendum on the way Republicans have sacrificed American security in their fealty to Donald Trump.