

TRUMP PROPOSES A NEW PLAN TO STEAL CLASSIFIED DOCUMENTS

In the Trump stolen document case, the two sides have presented their plans for what they call a Special Master.

- Common plan and proposed names
- Trump plan
- Government plan

The government's plan *is* a Special Master plan, one that would be finished by mid-October.

Trump's plan is a plan to steal documents from intelligence agencies and to stall until close to the time – it seems to hope – Jim Jordan gets a gavel in Congress and so can muck up the criminal investigation into Trump's theft and retheft.

The key differences between the two plans are as follows:

Trump proposes a plan to steal classified documents

Trump argues that even classified documents should go to the Special Master (and before that, his lawyers, including the one who is a witness in this investigation, Evan Corcoran) and effectively *lets the Special Master override* the decision of the Executive Branch over classification.

Plaintiff believes the Government's objection to the Special Master reviewing documents they deem classified is misplaced. First, the Government's position incorrectly presumes the

outcome—that their separation of these documents is inviolable. Second, their stance wrongly assumes that if a document has a classification marking, it remains classified in perpetuity. Third, the Government continues to ignore the significance of the Presidential Records Act (“PRA”). If any seized document is a Presidential record, Plaintiff has an absolute right of access to it while access by others, including those in the executive branch, has specified limitations. Thus, President Trump (and/or his designee) cannot be denied access to those documents, which in this matter gives legal authorization to the Special Master to engage in first-hand review.³

Plaintiff anticipates filing a deeper analysis of these issues in upcoming filings.

There are a lot of problems with this claim, including that it treats Trump as the President still and utterly upends the precedent on classification that Trump himself is relying on for his claim to be able to declassify things, *Navy v. Egan*, not to mention the Obama-era Executive Order that remains the basis for authority over classification (and so was the basis for any claim Trump ever had to classify and declassify things). There is absolutely no basis, anywhere, for a private citizen to override the classification determinations of the Executive Branch, yet that is what Trump is proposing.

Crazier still, Trump envisions government documents with classification marks that his Special Master decides aren’t classified to be Presidential records. That’s not necessarily true! Many of these documents – and certainly the secrets they tell – belong to agencies, not any President. Effectively, this is a plan to convert secret CIA and NSA documents into the private playthings of Donald J. Trump, which he

can access in perpetuity.

Under the government's plan, the Special Master would never receive anything currently marked as classified. The government does note that some of the unmarked documents may be determined by the government to be classified.

As this process moves forward, if the government identifies any potentially classified information within the contents of any of the Seized Materials without Classification Markings, the government will so advise the Court and propose actions to ensure that any such material is handled appropriately.

Trump creates busy work and delay

The government proposes that Trump conduct an initial review and make claims on categorization; anything on which the two sides agree will bypass the Special Master process. Trump says the Special Master should look at everything not in the current potentially privileged bucket.

The government sets as a deadline October 17 for the entire review (implicitly setting a deadline on Trump's own review too). It places a deadline of September 26 for Trump's initial review. Trump envisions the process will take 90 days or more (and sets no deadlines for himself).

Trump wants to split the cost for the Special Master, whereas the government proposes Trump paying everything, which would disincent him from stalling indefinitely.

Trump envisions removing documents from

investigators' hands

Under the government plan, non-personal documents will either end up in investigators' hands (if the Special Master doesn't deem them to be Executive Privileged) or at NARA (if the Special Master does).

v. For any documents identified as Presidential records – not claimed by Plaintiff as subject to Executive Privilege, those documents shall remain in custody of the government, with copies sent to the Archivist of the United States, and may be used by the government forthwith for any lawful purpose, including in the government's criminal investigation;

vi. For any documents identified as Presidential records – claimed by Plaintiff as subject to Executive Privilege, copies of those documents will be sent to the Archivist of the United States, and the process under the Presidential Records Act, 44 U.S.C. § 2201 et seq., may thereafter be followed.

Trump envisions Presidential Records to go to NARA, whether or not he succeeds in making an Executive Privilege claim, basically assuming that documents lawfully seized under a warrant should be taken out of the hands of the investigators.

e. Once the Special Master has completed the review process set forth in this Order and any dispute has been fully adjudicated, any documents identified as Presidential records will be returned to the Archivist of the United States, and the process under the Presidential Records Act, 44 U.S.C. § 2204, will be followed to determine the assertion of any restriction on access.

In either case, FBI can obtain a subpoena for documents if they have the need. Trump's plan just introduces another way to muck up the process.

Trump wants the lawful owner of these documents excluded

The government plan requires the Special Master to consult with NARA before making final decisions about whether something is a Presidential Record or not.

c. In categorizing Seized Materials without Classification Markings as personal items or documents, on the one hand, or Presidential records, on the other hand, the Special Master will consult with the National Archives and Records Administration ("NARA"); the government will facilitate the Special Master's consultations with NARA; and

Trump wants no involvement from NARA, the lawful owner of anything that is a Presidential Record.

Trump wants no paper trail

Trump wants to do this entire process without leaving a paper trail that the government (or a government appeal) can access. His ostensible logic – purportedly, that the Special Master must review things that even Trump and the government agree upon, which will add to the delay – is transparent bullshit. He says DOJ has already logged the materials (though the categories in question have changed), and so doesn't need to see Trump's logs before they get shared with the Special Master.

The principal difference in the parties' workflow is that Plaintiff sends

materials categorized by his counsel directly to the Special Master, while the Government proposes that it review Plaintiff's categorization by logs to determine if it agrees or disagrees with the categorization. The Government anticipates that it may agree on many of the categorizations and thus minimize the workload of the Special Master and expedite the review. The Plaintiff contends that a full review of all seized documents remains an important part of the Special Master's duties, even if the parties ultimately agree as to the return of various seized items. As the Government has already reviewed and categorized the seized materials, the Plaintiff believes a review by the Plaintiff, and submission to the Special Master, is the appropriate process.

And since Trump doesn't intend to share logs of his attorneys' determinations with the government, much of the determinations will be made via *ex parte* discussions with the Special Master.

Because its workflow transmits all categories of documents to the Special Master without logs, Plaintiff proposes authorization for regular *ex parte* communications on categorization with only the Special Master's final report and recommendation disclosed to the Government.

This will not only delay the entire process, but will prevent the government from obtaining some materials before determinations on all the documents are done. It will also hide what would surely be outrageous claims of declassification from the government and, ultimately, the public.

And by refusing to share a log with the government, Trump keeps the involvement of an attorney who is already a witness in the

criminal investigation out of the hands of the government. And, as noted, this keeps any paper trail out of the hands of any appellate ruling.

Update: Section on logging and *ex parte* communication added.