

CAUSE THE HARM, AND THEN SAY NOTHING: TRUMP HAS HAD AILEEN CANNON'S PROOF OF HIS INJURY FOR A WEEK AND SAID NOTHING

As I have repeatedly laid out, to intervene (improperly, the 11th Circuit has ruled) in the search of Trump's home, Aileen Cannon created an injury, and then intervened to fix it.

When DOJ asked for permission on August 30 to share with Trump the potentially privileged documents separated out by the filter team, she prohibited them from doing so. She wanted to deal with this all "holistically." Then, in all her subsequent rulings in this case, she pointed to the fact that Trump didn't have possession or insight into those privileged documents as one of the only harms suffered by the seizure of the documents at his home.

[T]wenty days ago, DOJ asked for permission to share the items they had determined to be potentially privileged with Trump's lawyers so they could begin to resolve those issues. Twenty days!!

But Cannon prohibited DOJ from doing so, because she wanted to deal with this all "holistically."

MR. HAWK: We would like to seek permission to provide copies – the proposal that we offered, Your Honor, provide copies to counsel of the 64 sets of the materials that are Bates stamped so they have the opportunity to start reviewing.

THE COURT: I'm sorry, say that

again, please.

MR. HAWK: The privilege review team would have provided Bates stamped copies of the 64 sets of documents to Plaintiff's counsel. We would like to seek permission from Your Honor to be able to provide those now, not at this exact moment but to move forward to providing those so counsel has the opportunity to review them and understand and have the time to review and do their own analysis of those documents to come to their own conclusions. And if the filter process without a special master were allowed to proceed, we would engage with counsel and have conversations, determine if we can reach agreements; to the extent we couldn't reach agreements, we would bring those before the Court, whether Your Honor or Judge Reinhart. But simply now, I'm seeking permission just to provide those documents to Plaintiff's counsel.

THE COURT: All right. I'm going to reserve ruling on that request. I prefer to consider it holistically in the assessment of whether a special master is indeed appropriate for those privileged reviews.

In her order denying DOJ's request for a stay of her injunction (and several times before that), Cannon pointed to precisely these reserved potentially privileged items to find a harm to Trump that she needed to address.

To further expand the point, and

as more fully explained in the September 5 Order, the Government seized a high volume of materials from Plaintiff's residence on August 8, 2022 [ECF No. 64 p. 4]; some of those materials undisputedly constitute personal property **and/or privileged materials** [ECF No. 64 p. 13]; the record suggests ongoing factual and legal disputes as to precisely which materials constitute personal property and/or privileged materials [ECF No. 64 p. 14]; and **there are documented instances giving rise to concerns about the Government's ability to properly categorize and screen materials** [ECF No. 64 p. 15]. Furthermore, although the Government emphasizes what it perceives to be Plaintiff's insufficiently particularized showing on various document-specific assertions [ECF No. 69 p. 11; ECF No. 88 pp. 3–7], it remains the case that Plaintiff has not had a meaningful ability to concretize his position with respect to the seized materials given **(1) the *ex parte* nature of the approved filter protocol,** (2) the relatively generalized nature of the Government's "Detailed Property Inventory" [ECF No. 39-1], and (3) Plaintiff's unsuccessful efforts, pre-suit, to gather more information from the Government about the content of the seized materials [ECF No. 1 pp. 3, 8–9 (describing Plaintiff's rejected requests to obtain a list of exactly what

was taken and from where, to inspect the seized property, and to obtain information regarding potentially privileged documents)] [my emphasis]

I've written about how Cannon outright invented the claim that the medical and tax records were personal property. Both inventories thus far provided to Trump comply with the law (and, importantly, Custodian of Records Christina Bobb signed the first with no complaint about the accuracy or level of detail, arguably waiving any complaint).

But the single solitary reason why the filter protocol remained unavailable to Trump's team on September 15, when Cannon wrote this order, is because she prohibited DOJ from sharing it with Trump over two weeks earlier.

Cannon, personally, created the harm, then used that harm to justify her intervention to address it.

On September 16, the day after her order, DOJ repaired that alleged injury. As they explained in their filing before Raymond Dearie, they provided this material to Trump the day after Judge Cannon's order.

With respect to the Filter Materials, and consistent with the Appointment Order, on September 16, 2022, the Privilege Review Team provided Bates-stamped copies of the Filter Materials, as well as a list of the materials with short descriptions and Bates ranges, to Plaintiff's Counsel.

Trump has in hand the basis of Cannon's claim DOJ accessed materials improperly. Trump has in hand the materials pertaining to medical, tax, and accounting matters that formed the basis of

Cannon's claim DOJ had seized personal material. Trump has in hand materials that would reflect DOJ's filter protocol.

Nevertheless, Trump has said nothing about what's in those materials.

By the time Trump submitted his proposed topics to Dearie on September 19, Trump had had those documents for at least 48 hours. Nevertheless, he asked for two more weeks to make any privilege determinations over them – until after they had first seen the classified documents.

Plaintiff to create privilege log (with basis) for Exh. A documents

By the time Trump submitted his response to the 11th Circuit, Trump had had at least three days to review that material. Nevertheless, in his response, he still claimed to be uncertain over whether those really were attorney-client privileged.

The material seized from President Trump's home includes not only "personal effects without evidentiary value" but also approximately five hundred pages of material that is **likely subject to attorney-client privilege**, as well as medical documents, and tax and accounting information. [my emphasis]

Trump has now had those documents – 64 sets of documents, amounting to 520 pages – for almost a week.

Importantly, since Tuesday, a proposed protective order has been before Judge Cannon, but she has taken no action. Which is to say, for almost a week, Trump has had those potentially privileged documents in hand, *without any restrictions from Cannon* on whether Trump could speak of them publicly.

Relatedly, Cannon has still not acted on DOJ's September 8 request that she unseal the filter team's status report, from which she drew her

claim that some of these potentially privileged documents pertained to Trump's personal medical, tax, and accounting issues, rather than (as I suggested they might pertain to) discussions with government lawyers about legal action pertaining to things like his COVID diagnosis, his challenge to various Mazars subpoenas, and matters pertaining to the Old Post Office building. Cannon has not let the rest of us see out of what discussion she manufactured that harm.

Trump's lawyers have had access to the filter status report for over three weeks. Trump's team has had those potentially privileged materials for a week.

And neither Trump nor his lawyers has said anything about the grave harm done by the seizure of those documents.

Trump has had the ability for a week to tell us all about the harm on which Cannon hung her intervention. He even had that material – with no protective order! – when he wailed about his victimhood with Sean Hannity. And he has been silent about the core imagined harm that Cannon used to intervene.

Go to emptywheel resource page on Trump Espionage Investigation.