

JUST FOLLOWING ORDERS: RAYMOND DEARIE'S STRICT COMPLIANCE WITH AILEEN CANNON'S ORDERS

Yesterday, two different filings were added to the Trump v. America docket. The first was an order from Judge Aileen Cannon, stripping the language pertaining to classified documents from her order appointing Raymond Dearie to be Special Master. The second, posted shortly thereafter, was Judge Raymond Dearie's draft order for work flow.

Dearie's order has rightly attracted attention for the lengthy instructions on how Trump must make any challenges the detailed inventory FBI released in the next week. (Note, according to the current schedule, Trump will have 4 days after receiving the documents to make such challenges.)

I. VERIFICATION OF THE DETAILED PROPERTY INVENTORY

No later than September 26, 2022, a government official with sufficient knowledge of the matter shall submit a declaration or affidavit as to whether the Detailed Property Inventory, ECF 39-1, represents the full and accurate extent of the property seized from the premises located at 1100 S. Ocean Boulevard, Palm Beach, Florida 33480 (the "Premises") on August 8, 2022, excluding documents bearing classification markings (the "Seized Materials"). See Appointing Order ¶ 2(a); Order Following Stay ¶

1. No later than September 30, 2022,

Plaintiff shall submit a declaration or affidavit that includes each of the following factual matters:

a. A list of any specific items set forth in the Detailed Property Inventory that Plaintiff asserts were not seized from the Premises on August 8, 2022.

b. A list of any specific items set forth in the Detailed Property Inventory that Plaintiff asserts were seized from the Premises on August 8, 2022, but as to which Plaintiff asserts that the Detailed Property Inventory's description of contents or location within the Premises where the item was found is incorrect.

c. A detailed list and description of any item that Plaintiff asserts was seized from the Premises on August 8, 2022, but is not listed in the Detailed Property Inventory.

This submission shall be Plaintiff's final opportunity to raise any factual dispute as to the completeness and accuracy of the Detailed Property Inventory.

No later than October 14, 2022, the government shall submit a declaration or affidavit from a person with sufficient knowledge of the matter responding to any factual disputes as to the completeness and accuracy of the Detailed Property Inventory raised in Plaintiff's submissions. Upon reviewing the parties' submissions, the undersigned will schedule further proceedings as needed to resolve any such disputes including, if necessary, an evidentiary hearing at which witnesses with knowledge of the relevant facts will provide testimony. To the extent that the resolution of any such factual disputes identifies additional

materials that should be reviewed, the undersigned will set further proceedings as needed.

The identification and resolution of any factual disputes as to the completeness and accuracy of the Detailed Property Inventory will proceed concurrently with the substantive review procedures described below

From reports of the hearing the other day, it seemed that Dearie asked if this was really necessary. Jim Trusty admitted Trump doesn't know what's in the boxes. So this *seems* like a concession to Trump's team, an extended focus on whether the FBI accurately cataloged the items taken from Trump's house. But in practice it ends up being a very strict requirement on Trump that he substantiate things – such as his claim to Hannity, the other day, that the FBI agents took his will – that he has said publicly. Trump also admitted to Hannity that his video of the search doesn't show the actual rooms from which items were seized, something I predicted (because there's no way Trump would take video of his office accessible from New York). So while this is precisely what Trump had asked for, it ends up locking Trump in in ways that may limit any criminal defense strategies in the future.

As Dearie said the other day, Trump chose to make himself a plaintiff, and in that posture, he may be forced to make affirmative claims he would never be forced to make as a defendant.

Dearie also required that Trump differentiate the documents he claims are Executive Privileged that can be accessed by the Executive from those that cannot.

Plaintiff shall provide the Special Master and the government with an annotated copy of the spreadsheet described above that specifies, for each document, whether Plaintiff asserts any

of the following:

- a. Attorney-client communication privilege;
- b. Attorney work product privilege
- c. Executive privilege that prohibits review of the document within the executive branch;
- d. Executive privilege that prohibits dissemination of the document to persons or entities outside the executive branch;
- e. The document is a Presidential Record within the meaning of the Presidential Records Act of 1978, 44 U.S.C. § 2201, et seq. ("PRA"); see id. § 2201(2); and/or
- f. The document is a personal record within the meaning of the PRA; see id § 2201(3).

This takes Trump's claims of (and Cannon's unilateral reimagination of) Executive Privilege literally. But it also requires Trump to make a claim that will be easier to defeat on appeal. It effectively requires Trump to create a new category of documents that will make DOJ's appeal easier.

Dearie's order requires Trump to pay his bills or face sanction.

No later than seven calendar days after the undersigned has resolved any such disputes (or seven calendar days after receiving an invoice as to which Plaintiff raises no objections), Plaintiff will submit payment in full as directed on the invoice. Failure to make timely payment will be deemed a violation of the Special Master's order subject to sanction pursuant to Federal Rule of Civil Procedure 53(c)(2).

Finally, Dearie revealed that retired Magistrate Judge James Orenstein will assist him in the review – and that only Orenstein will be getting paid, and that at a rate below what other Special Masters make – Trump got off easy on this front!

The undersigned has determined that the efficient administration of the Special Master's duties requires the assistance of the Honorable James Orenstein (Ret.), a former United States Magistrate Judge for the Eastern District of New York, who has experience with complex case management, privilege review, warrant procedures, and other matters that may arise in the course of the Special Master's duties. Judge Orenstein has served as an appointed amicus curiae in the Foreign Intelligence Surveillance Court pursuant to 50 U.S.C. § 1803(i)(2) and currently holds Top Secret clearance.

[snip]

As a United States District Judge in active service, the undersigned will seek no additional compensation for performing the duties of Special Master in this action. The undersigned proposes that Judge Orenstein be compensated at the hourly rate of \$500.

As a Magistrate, Orenstein has repeatedly pushed back on governmental surveillance, first on "combined orders" as part of what was called the "Magistrate's Revolt" in the 00s, and then refusing an All Writs Act order on Apple to break into an Apple phone. Dearie's revelation that Orenstein served as an appointed amicus on the FISC was news to me and other close FISC watchers, but I've got a few guesses about what role he may have played. In short, this is further evidence of the seriousness of this review.

Meanwhile, no one really knows what effect Cannon's order will have. Along with the orders pertaining to classified information, her order takes out this paragraph, requiring interim reports.

The Special Master and the parties shall prioritize, as a matter of timing, the documents marked as classified, and the Special Master shall submit interim reports and recommendations as appropriate. Upon receipt and resolution of any interim reports and recommendations, the Court will consider prompt adjustments to the Court's orders as necessary.

But it leaves these two passages in.

The Special Master shall make ex parte reports to the Court on an ongoing basis concerning the progress of resolving the issues above.

[snip]

The Special Master may communicate ex parte with the Court or either party to facilitate the review; provided, however, that all final decisions will be served simultaneously on both parties to allow either party to seek the Court's review.

I had thought this might be an attempt to narrow the scope of DOJ's appeal, taking the classified records off the table. There's some dispute whether she's even permitted to do this given the pending appeal before the 11th Circuit. But, the actual injunction, now stayed, remains in place, as does the original September 5 order, so that will still be within the scope of DOJ's appeal. This change was about the order to Dearie, not Cannon's usurpation of authority she doesn't have.

But I find the order interesting given how

literally Dearie took Cannon's order to test the inventory and let Trump make Executive Privilege claims that will be easier to defeat on appeal.

In the hearing the other day, Trump lawyer Jim Trusty suggested that Dearie had overstepped his mandate by asking Trump to provide proof he had declassified anything. Dearie responded by saying that he was doing exactly what he had been told.

The judge, a veteran of the Foreign Intelligence Surveillance Court, expressed puzzlement about what his role would be if the government says certain documents are classified and Trump's side disagrees but doesn't offer proof to challenge that.

"What am I looking for?...As far as I am concerned, that's the end of it," Dearie said. "What business is it of the court?"

James Trusty, one of Trump's attorneys, called it "premature" for Dearie to consider that issue right now. "It's going a little beyond what Judge Cannon contemplated in the first instance," he said.

In one of several moments of palpable tension with the Trump team, Dearie replied: "I was taken aback by your comment that I'm going beyond what Judge Cannon instructed me to do. ... I think I'm doing what I'm told."

Cannon revised her order to Dearie so that, in ignoring the classified documents, he can continue to do "what he's told."

Dearie (and Orenstein) likely saw precisely what I did: Cannon edited the standard boilerplate on Special Masters to allow herself the authority to remove Dearie for reasons beyond the timeliness of the review.

So it's possible Dearie made sure Cannon's order

to him was revised so he can continue to strictly follow her orders, with all the pain that will cause Trump.