JACK SMITH TO AILEEN CANNON: TREATING NON-LAWYER TOM FITTON'S THEORIES AS LAW WILL LEAD TO MANDAMUS

Both Trump and Jack Smith have responded to Aileen Cannon's whack order to write proposed jury instructions as if the Presidential Records Act says something it doesn't. Neither are all that happy about it.

Trump used his response to claim that having the jury assess whether Trump really did make these documents personal records rather than simply steal them would put them in the role that, he's arguing, only a (former) President can be in.

Smith — as many predicted — spent much of the filing arguing that Cannon cannot leave this issue until jury instructions because it must have an opportunity to seek mandamus for such a clear legal error; they cite the 11th Circuit slapdown of Cannon's *last* attempt to entertain this fantasy in support.

Along the way, though, Smith also did something I had hoped he would do: explain where, and when, Trump's own whack theory came from in the first place.

It came from Tom Fitton's Xitter propaganda in response to the public report, in February 2022, that Trump had returned documents, including classified ones. But even after Fitton first intervened, Trump's handlers continued to treat any remaining classified documents as presidential records for months.

> On February 8, 2022, the day after the Washington Post article was published, the president of Judicial Watch posted

> the following two statements on Twitter[5]:
>
> 
> Fact check: The left media is being dishonest about the Trump records issue. A president has discretion on what docs to retain as presidential records while in office. So the law allows Trump to tear up documents, shred them, and take documents when he left the White House.
>
> 9:06 AM · Feb 8, 2022
>
> **1,489** Retweets **88** Quote Tweets **4,380** Likes
>
> Fun story: @JudicialWatch sued over Bill Clinton's hiding records in his sock drawer. Court told us to pound sand because presidents essentially can do whatever they want with their records. Remember this when you hear anti-Trump media caterwauling about his tearing up documents.
>
> 9:30 AM · Feb 8, 2022
>
> **1,498** Retweets **75** Quote Tweets **3,112** Likes
>
> Immediately after posting the second Tweet, the Judicial Watch president sent to an employee in Trump's post-presidency office a link to the Tweet and offered to discuss the issue with Trump. A few hours later, the Judicial Watch president sent the same person his analysis of the case Judicial Watch v. NARA, 845 F. Supp. 2d 288 (D.D.C. 2012). That evening, the Judicial Watch president circulated to the employee a proposed public statement for Trump's consideration, which included language that the PRA and judicial decisions gave Trump the right to keep the documents he returned to NARA. The statement never issued.
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> Around this same time, the Judicial Watch president, **who was not an attorney**, told another Trump employee that Trump was being given bad advice, and that the records Trump possessed at Mar-a-Lago should have been characterized as personal. The second employee advised the Judicial Watch president that they disagreed with the Judicial Watch president's analysis: in Judicial Watch, former President Clinton

> had made the designation of certain records personal while President, whereas Trump had not done so. The second employee further informed Trump that the Judicial Watch president was wrong and explained why. Nevertheless, on February 10, 2022, Trump released a statement claiming in part, "I have been told I was under no obligation to give the material based on various legal rulings that have been made over the years."6 Before this time, the second employee had never heard this theory from Trump. No other witness recalled Trump espousing this theory until after the Judicial Watch president conveyed it to him in February 2022.

Smith doesn't, however, draw out the implication of this explicitly.

Not only has Trump been falsely suggesting — without evidence — that he did designate these documents personal records. He couldn't have done so, because he didn't know of this theory until over a year after he stole the documents.

But Cannon is such a chump that she has been chasing a theory spun up by Fitton, someone who has only an English BA.

Cannon may well respond poorly to Smith's use of 20-some pages to lay all this out. It's the kind of thing that routinely elicits miffed responses from her.

At this point, though, it seems Smith is simply laying a record *for* a challenge at the 11th Circuit.