

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DONALD J. TRUMP,	:	22-CV-81294 (AMC)
Plaintiff,	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
	:	Tuesday, September 20, 2022
UNITED STATES OF AMERICA,	:	2:00 p.m.
Defendant.	:	
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TRANSCRIPT OF CIVIL CAUSE FOR PROMOTION CONFERENCE
BEFORE THE HONORABLE RAYMOND J. DEARIE
SPECIAL MASTER

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A P P E A R A N C E S: (Continued.)

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1 (In open court.)

2 THE COURT: Good afternoon, folks, please be
3 seated.

4 COURTROOM DEPUTY: Good afternoon this is a
5 meeting with the Special Master in the matter of Donald
6 Trump versus United States of America.

7 Counsel, state your appearances for the record
8 starting with the plaintiff.

9 MR. TRUSTY: Good afternoon, your Honor. Jim
10 Trusty on behalf of the plaintiff. I'm joined by Chris
11 Kise, Lindsey Halligan and Evan Corcoran.

12 Pleasure to see you, Judge.

13 THE COURT: Thank you and good afternoon.
14 Welcome.

15 MR. BRATT: Jay Bratt, Tony Gonzalez from the
16 Southern District of Florida. Julie Edelstein from the
17 Department of Justice. Steve Marzen from Department of
18 Justice and Ben Hawk from the Department of Justice.

19 THE COURT: Welcome, all. I realize I've dragged
20 all to Brooklyn, New York albeit on a beautiful day. But
21 I'll try, as we go forward here, to keep this kind of thing
22 at a minimum as best we can.

23 Judge Cannon, as you all know, has asked me to
24 assist you all and to assist her in evaluating certain
25 claims. I'm going to do the best I can with the time

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1 available to us.

2 As you know, we have little time to complete the
3 tasks assigned to the Court. I have presented to you
4 yesterday a draft schedule. I've gotten your comments and I
5 understand there's some stated concerns about the time
6 allocations. I'm happy to hear you on that. Shortly after
7 we conclude here today, I will issue a scheduling order and
8 provide Judge Cannon with a copy of it as well.

9 I think, as a preliminary matter, I just want to
10 make sure I have a full understanding of what really is in
11 dispute. She's asked me to verify the accuracy of the
12 detailed property inventory; address the classification
13 status of the seized documents; ultimately address disputes
14 regarding privilege; categorization of seized documents
15 under the Presidential Records Act; and she's also asked me
16 to assess the full Rule 41 motion for return of the property
17 and I fully understand that motion has not yet been made.

18 I follow directions. I do what I'm told. We
19 won't be in a position to, I appreciate intelligently
20 address any such a claim until the first three issues that I
21 just noted are resolved. We note the subset of materials
22 that the plaintiff may have a possessive interest in.

23 We're going to proceed with what I call
24 "responsible dispatch." I'm not going to hurry but we have
25 a lot to do and a relatively short period of time. I'm told

1 there are some 11,000 documents in play. I have no idea
2 what that means in terms of my workload because until I hear
3 from plaintiff's counsel and I'm able to evaluate the number
4 of challenges, claims of privilege, et cetera. Not until
5 then will I know fully the full range of my responsibility.

6 I just want to say at the outset that this is not
7 a criminal case. This is a civil matter brought by the
8 plaintiff which means, of course, the plaintiff has the
9 burden in the first instance of establishing his right to
10 relief. I realize there may be all sorts of litigation
11 strategies in play and I understand and respect that but
12 certainly can't let litigation strategy dictate my
13 resolution and recommendation to Judge Cannon on the
14 viability of any claim of privilege. I just want that to be
15 understood.

16 I'm faced with some discrete number of legal
17 judgments and I will endeavor to make responsibly and in due
18 course and follow that my recommendation to Judge Cannon
19 who, of course, we will describe those disputed issues of
20 fact.

21 Now, let me turn shortly, briefly, to the greatest
22 categories that we have.

23 The first being, of course, verification of the
24 detailed property inventory. I just want to make sure. I
25 haven't been able to study the file, it seems to grow by

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1 leaps and bounds almost by day. I've gotten familiar with
2 the various filings. So I have to ask: Is there a real
3 dispute about the property inventory?

4 MR. TRUSTY: Your Honor, should I address the
5 Court sitting down?

6 THE COURT: Where ever you're more comfortable
7 given the microphone.

8 MR. TRUSTY: I'm Pavlovian. I'm used to standing
9 up. I can try and sit here and address the Court and keep
10 the microphone in play.

11 THE COURT: I understand.

12 MR. TRUSTY: Judge, first of all, I completely
13 appreciate your preliminary comments and share that faith in
14 process in terms of your involvement and following quite
15 rigidly, I suppose, the directives of the District Court in
16 Florida.

17 On that first component, from the, again, this was
18 from looking at the draft plan that was submitted yesterday
19 or distributed yesterday, I actually think that in some ways
20 this issue is probably better a little deeper into the
21 process and I will explain why in a second. This particular
22 issue is not at all about strategy but what the Court is
23 anticipating is the plaintiff identifying, essentially,
24 shortcomings in the inventory ether by way of either items
25 that were not actually found at the locations alleged or

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1 mislabeled within the inventory. That actually is going to
2 require a full inspection of 11,000-plus items. And I will
3 tell the Court we're not the beneficiary from the
4 plaintiff's side of having some preexisting detailed
5 audit/inventory of our own which, again, the Court might not
6 be aware of that.

7 So we're not in a position where we're starting
8 with a list of 11,000. What we're starting with are the
9 Government's two inventories that we received. The first
10 one that Judge Cannon found to be insufficient under
11 Rule 41. But interestingly, the first one actually had a
12 few specifics it would say, "Pardon Package," for instance.
13 But it was identifying at least some of the documents. The
14 second one literally takes every document and says
15 "U.S. Government record" as the description. So we are -- I
16 would just submit to the Court starting from scratch.

17 Now, it go to the heart of your Honor's question,
18 I'm not -- I can't at this point make a full-blown
19 representation that we're sure there's nothing that is at
20 issue, but I think that we would all probably be well served
21 economically or efficiently by letting us have the time to
22 look at all the documents maybe electronically at first and
23 circle back to the Court.

24 I don't expect that there's going to be 11,000
25 instances that are at issue. There may be a handful or

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1 none, I don't know yet but we can do that expeditiously. I
2 just don't think that that should necessarily be the first
3 deadline in play.

4 THE COURT: So the answer to my question is you
5 don't know whether there is going to be a real dispute on
6 the inventory.

7 MR. TRUSTY: That's fair.

8 THE COURT: All right. Let me move on.

9 How quickly can you get these documents in digital
10 format and provide it to counsel?

11 MR. BRATT: Your Honor, I'm going have
12 Ms. Edelstein handle the questions.

13 THE COURT: Sure.

14 MS. EDELSTEIN: Good afternoon, your Honor.

15 THE COURT: If you're comfortable feel free to
16 remove your mask.

17 MS. EDELSTEIN: Thank you, your Honor.

18 As was conveyed in the letter that we filed
19 yesterday, the documents that are not yet in digital form.
20 This afternoon, we provided to the plaintiff's counsel a
21 list of five government-approved vendors. Once plaintiff's
22 counsel selects one, which we hope would be today, we would
23 be in a position to provide the documents to that vendor as
24 soon as tomorrow. So we would be hopeful that by Friday or
25 the latest Monday that plaintiff's counsel would have all

1 the documents in digital form.

2 THE COURT: Any reason why we can't agree on one
3 of those vendors?

4 MR. TRUSTY: I think we can agree to move very
5 quickly but it's a little hard to get an e-mail right before
6 the hearing and then know that we've already finished our
7 shopping of who would be the right vendor. We can certainly
8 jump on it quickly and try to get the vendor selected and
9 throw it back to the Government to do the download of the
10 data or begin the rolling download of the data.

11 THE COURT: You're not familiar with the vendors?

12 MR. TRUSTY: Some of my co-counsel are familiar
13 but, again, we would want to have an opportunity to quickly,
14 you know, review each one. I think if we had till Friday to
15 at least pick a vendor that's, you know, and we would do
16 everything we can to pick a vendor tomorrow or Thursday.

17 THE COURT: Let's do it tomorrow. Okay. You'll
18 have Bates Numbers on these documents.

19 MS. EDELSTEIN: Yes, your Honor we'll request that
20 with the vendors.

21 THE COURT: Will they be correlated to the
22 inventory in any way?

23 MS. EDELSTEIN: We will figure out the best way to
24 to that but we could do expect we will Bates Number them and
25 we can correlate them to the inventory but that may just

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1 take a little bit more time on our end.

2 THE COURT: And will it be searchable format.

3 MS. EDELSTEIN: Yes, your Honor.

4 THE COURT: Okay. And I take it we'll get one
5 master list?

6 MS. EDELSTEIN: We will we intend to provide two
7 lists, one for the documents that were not identified by the
8 filter team as potentially privileged, and the potentially
9 privileged documents will be handled separately.

10 THE COURT: Understood. Okay.

11 Now, as far as the inventory itself is
12 concerned -- well, I think you answered the question
13 already. You can't tell me the answer. You can't tell me
14 the answer until we get the documents, all right. Fair.

15 So tell me, I don't know who to address,
16 Mr. Bratt.

17 I guess in the absence of relief from the Circuit,
18 you say you ever find a way to move forward, could you give
19 me some indication there what we're going to do.

20 MR. BRATT: Yes. Again, I will defer to
21 Ms. Edelstein who has had more conversations than me with
22 the affected parties in the case.

23 MS. EDELSTEIN: Yes, your Honor.

24 And, you know, it depends on what the
25 Eleventh Circuit rules. But should the Eleventh Circuit

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1 deny our stay, most likely we will be in a position to
2 consider our other appellate options at that point, and I
3 don't know that we're going to be able to provide the
4 documents on the timeframe that your Honor has requested
5 with respect to the classified documents only, of course.

6 THE COURT: I understand.

7 Let's get to the, if I may, the Government, of
8 course, wants the classified documents off the table for the
9 moment at least and I understand that. We're dealing with
10 presumably highly sensitive information. If I'm going to
11 verify the classification, what am I looking at? Is there a
12 claim that the document is classified that should not have
13 been classified? Is that in play before me as a special
14 master? Is there a claim that something was labeled
15 purposefully classified that isn't? What exactly is the
16 nature of it?

17 The reason I ask is if the Government essentially
18 gives me prima facie evidence that these are classified
19 documents and you, for whatever reason, decide not to
20 advance any claims claim of declassification which I
21 understand is your prerogative, I'm left with a prima facie
22 case of classified documents. And as far as I'm concerned,
23 that's the end it.

24 Would you then maintain that notwithstanding
25 they're being classified documents that you might have a

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1 privilege or a claim under the Records Act?

2 MR. TRUSTY: Your Honor, there's a lot of layers
3 to that question. I'll try my best to answer.

4 Can I take my mask off?

5 THE COURT: Sure.

6 MR. TRUSTY: First of all, yes. I mean, I think
7 we've telegraphed in our pleadings so far without getting to
8 the point of a Rule 41 that the Presidential Records Act
9 does supersede traditional classification concerns. It
10 breaks down the universe into presidential and personal
11 records. And in the case of someone who has been President
12 of the United States, they have unfettered access along with
13 unfettered declassification authority.

14 So we do think that this exercise of creating the
15 buckets that we've all been anticipating and the Court
16 anticipates makes some sense independent of whether or not
17 there's an ultimate concession or belief by the Court at
18 least that the prima facie case is made.

19 But the starting point is the baby steps, your
20 Honor. The first thing is we've never had access to these
21 documents so we need access we'll be asking --

22 THE COURT: I understand that. My question
23 assumed that you didn't have access. My question simply
24 was, if they are prima facie on their face classified by the
25 Executive, but is it of the Court, without any evidence to

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1 the contrary, to conclude that they're anything but at least
2 prima facie.

3 MR. TRUSTY: Your Honor, that's the right paradigm
4 in terms of without evidence to the contrary. The point is,
5 from our perspective, is it's premature. What we're going
6 to be determining through this process of actually examining
7 documents and sifting through and creating and narrowing
8 disputes before you as the special master. At the same
9 time, we'll be developing or not theories for why or why not
10 a Rule 41(g) motion should be filed. If a Rule 41(g) motion
11 is filed, it relies on things like the Presidential Records
12 Act or general warrant allegation in violation of the
13 Particularity Clause of the Fourth Amendment those would be
14 independent.

15 If there is an added component to that motion that
16 says, these are effectively declassified documents then, at
17 that point, it makes sense to kind of follow what I think
18 the Court was anticipating in the draft plan which is
19 providing evidence so it's not just a he said-she said of
20 prima facie evidence.

21 So my point is, our only concern in terms of what
22 the Court has in that plan is that it's going a little
23 beyond what Judge Cannon contemplated in the first instance.
24 It's not that your plan doesn't make sense eventually if a
25 Rule 41(g) claim is brought that raises the declassification

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1 issue, we just don't think we can say it's fully before the
2 Court until we've had an opportunity to examine all of the
3 documents and decide whether or not a pleading under Rule
4 41(g) is appropriate.

5 THE COURT: I was taken aback by your comment that
6 I'm going beyond what Judge Cannon instructed me to do. I
7 looked at her order. On the second page, she says in plain
8 language, as plain as can be, evaluating claims for return
9 of property under Rule 41(g) of the Federal Rules of
10 Criminal Procedure. I think I'm doing what I'm told.

11 MR. TRUSTY: I don't dispute that at all, Judge.
12 All I'm saying is the claim under §41(g) is not here yet.
13 So we're not in the position without having seen the
14 physical evidence, and without having a chance to fully
15 explore what these documents purport to be to tell the Court
16 in good faith that I know that I have an argument to be made
17 about declassification.

18 So, again, I think we're --

19 THE COURT: Well, you did bring the lawsuit and
20 make that claim.

21 MR. TRUSTY: Well, we've teed up the issue for
22 resolution by saying, we have the concerns about whether or
23 not the Government ignored, again, we're remembering the
24 context of a §41(g) being roughly parallel to a Franks
25 Hearing or a motion to suppress a search warrant. What

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1 we've done is we've raised the issue. We have not been in a
2 position, nor should we be at this juncture, to fully
3 disclose a substantive defense relating to declassification
4 until we see the documents and have an opportunity to
5 explore our options under a filing under §41(g).

6 So, in a sense, I may have talked past the Court
7 unintentionally, I apologize for that. But we agree that
8 you're in a position to evaluate the claims and make reports
9 and recommendations for §41(g) litigation. All I'm
10 suggesting is, as much as we want to have clarification
11 today, we have to take some baby steps to get to the point
12 where we can commit to that as a matter of presenting
13 evidence to you in support of a §41(g). I can't do that
14 without -- it's not about being kind of gamesman-like, I
15 just can't do that without seeing the actual documents.

16 THE COURT: You wouldn't do that.

17 MR. TRUSTY: I would not. And, you know, I
18 haven't been before your Honor but I can tell you there's a
19 slew of federal judges that would agree with me on that. I
20 swear to you, your Honor.

21 THE COURT: I take your word for it.

22 Okay. So, all right, I think I've probably said
23 all I'm going to say. But getting back to the production of
24 the documents which is key because it seems to me, in terms
25 of a realistic scheduling order, I need that in place before

1 I can impose anything on the litigants.

2 You disagree?

3 MS. EDELSTEIN: No, I completely agree, your
4 Honor. And the Government thinks that the deadlines you
5 posed in this draft case management plan are very realistic.
6 The Government thinks that it's just of a matter of
7 potentially moving them back by a day or two to allow the
8 digital production of the records.

9 THE COURT: Okay.

10 Now, Judge Cannon allows me from time to time as
11 necessary to communicate with the parties ex parte. It's
12 not something we judges are used to doing. If it became
13 necessary to do that, would you advise my clerk before the
14 end of this session who it is in your respective camps that
15 I should be reaching out to. All right?

16 I think I've sort of touched on the areas of
17 concern. I'm going to give counsel an opportunity to weigh
18 in. And as I said, at some point I will issue a final
19 scheduling order.

20 Sir.

21 MR. TRUSTY: Thank you, Judge.

22 Your Honor, our original plans in terms of
23 submitting a proposed agenda to the Court obviously changed,
24 or at least I can tell you they changed, when we received
25 the draft plan from the Court. Despite the optimism

1 expressed from the Government that everything's fine within
2 a day or two, some components are just not feasible even
3 under their own scenario of getting a third-party contractor
4 and using relatively and doing a rolling disclosure. The
5 reality is I think some of the deadlines included the
6 Government giving us electronic versions of all the
7 documents short of the marked ones by Thursday, and our
8 responding to the Court on Thursday whether or not any of
9 these fell afoul from the inventory list.

10 So, you know, we've addressed that separately as
11 something that I think it would probably be most efficient
12 to let that simmer a little bit because it could resolve a
13 lot of it on its own, if not all. And so, and the
14 compression of the dates, again, I appreciate the spirit of
15 the Court's draft. Number one, it's a draft. And number
16 two, it's trying to make it clear to the parties that we
17 want this train to move on time. The way it's written now
18 essentially compresses everything into a three-week process.
19 And, you know, it's not to be in favor of delay, we want
20 resolution on these things, too.

21 THE COURT: You're a week off in your calculation.

22 MR. TRUSTY: Okay. Four weeks then? Sorry.

23 THE COURT: You're a week off in your calculation.

24 MR. TRUSTY: I think the September 22nd part was
25 right. And the Court also said that at the end of the draft

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1 plan that we should give the Court our concerns, objections,
2 whatever, proposed modifications by the 25th if I remember
3 off the top of my head. We're happy to do that, so I don't
4 want to suggest to the Court that we might not have a little
5 bit more between now and the 25th because we're really just
6 kind of digesting this overnight.

7 THE COURT: That's why I gave you the 25th.

8 MR. TRUSTY: I appreciate that. We'll make that
9 deadline, that's not a problem. What I would just suggest
10 to the Court is that we do have concerns enough about the
11 speed at which, and it's not about lack of good faith by the
12 Government or by us, but I think that for 11,000 items that
13 can translate in some ways when you talk to these vendors
14 to, I think, 220 man hours of review. Now, hopefully
15 because a lot of these items might be photographs or might
16 be articles of clothing or golf shirts, that that part will
17 accelerate our average. But I think that, to be fully
18 candid with the Court, that the vendor process and the
19 rolling review and our review is not something that lends
20 itself to being done in a couple of days. It's just
21 physically not going to work out that way. And we'll be
22 more specific in a more fulsome disclosure to the Court.

23 So we doing, I guess, quibble a little bit about
24 timing in terms of what the Court anticipates. And
25 hopefully, as the Government, you know, consults with their

1 vendors, they'll get some realistic dates there in terms of
2 what they think a couple of days means.

3 Substantively, your Honor, I think there was
4 really kind of two areas that we felt were going beyond the,
5 or potentially going beyond the limits of what Judge Cannon
6 set in motion. Again, there might be a little bit more that
7 we come up with that we can talk about before Sunday, I
8 think it is, the 25th. But in the short run, we just wanted
9 to flag in our letter and then flag again today that we have
10 the concerns that we've already talked about basically about
11 declassification defense and when and how that should be
12 borne out if it's going to be, meaning, that we shouldn't be
13 in a position to have to disclose declarations, witness
14 statements, whatever it might be, to substantiate that until
15 a Rule 41(g) is filed.

16 THE COURT: I don't disagree with you. As I said
17 a moment ago, I guess my view of it is you can't have your
18 cake and eat it.

19 MR. TRUSTY: Sure. Understood. And, again, but I
20 just want the Court to know our concern there is that we
21 shouldn't be in a position where we're providing inherent
22 important components to a defense essentially at this stage.
23 But if we make that leap because of a §41(g) filing then so
24 be it. Obviously, the Court is going to want evidence, not
25 just pure argument.

1 The second area that I wanted to or maybe one more
2 area after that. Within the original order of the Court,
3 Judge Cannon gave you as Special Master the discretion to
4 consult with NARA, with the National Archivist, I don't
5 remember the exact language, but it's essentially you have
6 that ability.

7 The Government took the opportunity in their
8 filing yesterday to strongly urge you to consult with NARA
9 as part of this process. And I would say from the
10 plaintiff's perspective, we would object to that. And
11 it's -- and I'll come back with kind of a fallback position
12 to make it a little easier on the Court. But we have an
13 objection. NARA essentially is a potential fact witness;
14 they are an interested party. In fact, from even recent
15 history, it's clear that this entity and the archivist
16 himself or herself in recent history have been very
17 politicized. Right now, it's the national archives people
18 that put a warning label on the U.S. Constitution because
19 they're concerned it will trigger people. It's the
20 archivist who let Sandy Berger into her personal office to
21 access important documents relating to 9/11 which he then
22 stuffed down his pants before his misdemeanor plea a few
23 months later.

24 So this is a group that has shown that even in
25 the, you know, in the public setting that they're highly

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1 politicized. We think their conduct in this case is
2 politicized as well. And so, it's an odd scenario to think
3 that a special master, particularly, a special master with
4 your Honor's background would have the need to get
5 Presidential Records Act guidance, essentially, from a group
6 like NARA. And I would just submit to the Court that, you
7 know, the flipside would be a little strange. Like, if we
8 said, your Honor, we have an expert on declassification and
9 we'd love for you to just talk to him or her ex parte
10 whenever you need to. I think the Court would properly
11 hesitate, like, wait a minute, am I getting into essentially
12 interested parties, fact witnesses, solicited experts,
13 whatever.

14 So I guess our concern there is broad and sincere.
15 If the Court gets to a point where your Honor, I'm sorry,
16 Special Master, as special master decides that you want to
17 take advantage of that discretion. We're not quibbling over
18 the fact that she gave you the discretion, we'd at least
19 like the Court to consider having us heard, have an
20 opportunity to address in some perhaps elliptical way what
21 it is that you want from NARA and for us to weigh in. But
22 we think the Court should err on the side of declining that
23 invitation that the Government keeps putting out there
24 because we think it's a political and partisan organization.

25 THE COURT: Well, I think you're painting with a

1 rather broad brush to be fair to the folks at NARA. But I
2 don't disagree with you. I mean, at the moment, I can't
3 identify a need for me to speak to them. On the other hand,
4 if I do identify a need to speak to them, you'll be notified
5 and be given an opportunity to speak. I understand your
6 concerns.

7 MR. TRUSTY: Thank you, Judge.

8 THE COURT: Yes, sir.

9 MR. TRUSTY: I have one other area just to raise
10 and then obviously respond to any questions the Court still
11 has for the plaintiff.

12 We're not at all conceding classification.
13 Obviously, you're aware of that from what's got us to that
14 point for these hundred documents. But it does seem to make
15 practical sense because the Government is obviously still
16 believing that these are classified documents and that that
17 restricts access. To find a way to have expedited clearance
18 for more folks on my team. I actually have TS clearance
19 from a recent matter in the Eastern District of Virginia, so
20 I'm good for a few years. But it's a strange scenario
21 where, again, in the vacuum of not having final decisions
22 about classification, the Government is going to err on the
23 side of saying, we've got to treat it that way, we've got to
24 restrict access, we can't let Mr. Trusty even talk to his
25 fellow attorneys about what he sees. And I'm assuming the

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1 Court's got more clearance than has ever been created on
2 Earth from your background as a Judge on the FISA Court, so
3 I don't think it's a problem for the Court. But we would
4 like to see if the Court would be willing to essentially
5 exhort DOJ to move expeditiously on additional clearances
6 submitted to them. Again, just to kind of keep them
7 satisfied and allows us to have more access than just one
8 person. Usually, when you have this conversation with DOJ
9 or with U.S. attorneys they say, well, that's JMD, that's
10 Justice Management Division, they're totally different.
11 Yeah, they are. They're not physically sitting in the same
12 office but they're part of Justice. In a case like this
13 where all hands want to move expeditiously, we would just
14 appreciate some help from the Court kind of pushing that
15 along where we might be able to get people cleared in a way
16 where it doesn't slow anything down and doesn't
17 unnecessarily hamstring us if we review these documents.

18 THE COURT: Frankly, the thought occurred to me
19 when it was first drafted. Let's not belittle the fact that
20 we are dealing with at least potentially legitimately
21 classified information. The Government has a very strong
22 obligation, as all of us, to see it to that that information
23 doesn't get in the wrong hands. It's not just a matter, it
24 seems to me, of being cleared. It is a matter of need to
25 know. And if you need to know, you will know. That's the

1 way I see it. If I can make my judgments without -- I don't
2 want to see the material -- it's presumably sensitive
3 material. If I can make my recommendation to Judge Cannon,
4 right or wrong, without exposing myself or to you to that
5 material, I will do it. On the other hand, if I can't, we
6 have to take another alternative.

7 MR. TRUSTY: Understood.

8 THE COURT: I take it very seriously on both sides
9 of the question.

10 All right. You completed your comments?

11 MR. TRUSTY: I think so. Thank you, Judge.

12 THE COURT: I appreciate them very much.

13 All right. On Uncle Sam's side. Mr. Bratt, who
14 is going to be your spokesperson for spokespeople.

15 MR. BRATT: So for purposes of the Court's contact
16 with the Government, I and Ms. Edelstein are the primary
17 contacts.

18 THE COURT: Okay.

19 MR. BRATT: One thing I'd like to clarify just in
20 response to something Mr. Trusty said with respect to the
21 vendors. Our understanding under the Judge Cannon 's order
22 is that they are responsible for the expenses of this
23 process. So we've given them vendors that are approved for
24 us to work with on government systems. We gave them until
25 tomorrow to choose an vendor. They also need to finalize

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1 the contract, the engagement, and payment. And we will then
2 after that expeditiously deliver the documents to be scanned
3 and Bates-stamped.

4 THE COURT: All right. I assume, Mr. Trusty, that
5 you and your colleagues will act in good faith and in your
6 obligations to me and to your client.

7 MR. TRUSTY: Your Honor, we absolutely will always
8 act in good faith. I would just say, having five vendors
9 thrown at us today with us paying for them, we have to at
10 last be able to show our client and ourselves what the
11 different numbers look like to get, you know, essentially
12 estimates or engagements from them. I would at least ask
13 till Friday. That's not asking --

14 THE COURT: You got it. Friday it is.

15 MR. TRUSTY: Thanks, Judge.

16 THE COURT: Anything else from the Government?

17 MS. EDELSTEIN: Your Honor, if I could respond to
18 a couple other points made by Mr. Trusty.

19 THE COURT: By all means.

20 MS. EDELSTEIN: And with respect to the timeline,
21 even if the vendor is selected on Friday, I think we'll be
22 in a position early next week to provide the documents over
23 to plaintiff's counsel and that should only necessitate the
24 moving of the proposed deadlines in your scheduling order by
25 a couple days.

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1 THE COURT: You'll keep me informed.

2 MS. EDELSTEIN: Yes, your Honor, we will.

3 With respect to NARA. The appointment order, of
4 course, does give you discretion to consult with them. And
5 I would just point out that these documents are supposed to
6 be NARA's custody. And if they had not be stored in an
7 improper place, they would be in the custody of NARA now.
8 And we will, of course, defer to you, your Honor, as to how
9 helpful you find it to consult with NARA if you want to do
10 so. But I would point out that some of the documents would
11 require a call. For instance, if there is a newspaper
12 article that has the former president's handwriting on it,
13 does that make it a presidential record? And NARA, with
14 their expertise, is in the best position to make these kind
15 of determinations and may be able to assist you.

16 THE COURT: I won't hesitate if I think I need
17 their help.

18 MS. EDELSTEIN: I understand, your Honor.

19 THE COURT: I'm not going in with any preconceived
20 notion that I need a tutorial from NARA, that's all.

21 MS. EDELSTEIN: Understood.

22 We also want to make clear the Government's
23 position that the classification status of the documents
24 isn't ultimately for the Judicial Branch to decide. The
25 classification of documents under prevailing case law

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1 including the Supreme Court's ruling in the Department of
2 Navy v. Egan makes very clear that it's an Executive Branch
3 determination whether to classify document and how to
4 control access to classified documents.

5 So while the Government has no objection to you
6 ordering to provide plaintiff's counsel to provide a
7 declaration along the lines that you have suggested with
8 respect to the declassification issue, the Government wants
9 to make clear that under the law we believe it is the
10 current Executive Branch's decision only, ultimately, as to
11 whether the documents are classified.

12 THE COURT: I understand that's your position.

13 MS. EDELSTEIN: And finally, we would like to
14 reiterate the point that your Honor made that there must be
15 a need to know to share classified information. And in
16 addition to that, even if Mr. Trusty has a top secret
17 clearance, that clearance alone without a reasons should he
18 have a need to know would not be sufficient to see number of
19 the documents at issue in this case. Some of the documents
20 are so sensitive that even members of the team that is
21 investigating possible offenses here have not yet been
22 provided the clearances to see these documents.

23 So we just want to make your Honor aware of the
24 very highly sensitive documents involved in this case.

25 THE COURT: I appreciate that.

1 MR. TRUSTY: Your Honor, two very quick things in
2 response.

3 THE COURT: Yes, Mr. Trusty.

4 MR. TRUSTY: First, it's kind of astounding to
5 hear the Government say that the President's lawyers don't
6 have a need to know. I mean, I know we're not sorting
7 through the final classification issues her. It's kind of
8 an amazing juncture to be dismissive of even one attorney
9 having access to the documents that form the justification
10 for their raid. But I will also want to go back --

11 THE COURT: I didn't hear you say that. If you
12 have a need to know for the appropriate resolution of this
13 issue.

14 MR. TRUSTY: I believe we have a need to know,
15 absolutely. I don't know how we can fully address the
16 issues that might come with a Rule 41 without having some
17 access under all sorts protective measures but some access.
18 I will say I want to finish with one other point which is a
19 letter from the National Archivist on March 30th of 2017 to
20 Members of the Committee on Homeland Security and Government
21 Affairs. I just think this line is perfectly appropriate
22 point in response to what we just heard about consulting
23 NARA. The answer from the archivist to a question about
24 this was about President Trump's tweets as presidential
25 records was: No, under the PRA, Presidential Records Act,

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1 records management authority is vested in the President and
2 NARA does not make determinations with respect to whether
3 something is or is not a presidential record.

4 I mean again, I made my points about NARA but
5 there they are affirmatively saying that's not our game to
6 make these classifications. So, again, you will see more
7 writing from us on this issue because we think it's an
8 overarching issue that essentially negates the issue of
9 classification.

10 THE COURT: We're all in agreement then. NARA
11 doesn't it, I don't. Judge Cannon does. And with that,
12 we'll be, once we get the schedule in place, I will include
13 in there another conference call, a progress conference, and
14 I hope with an emphasis on the word "progress." I'll call
15 it a "progress conference." Hopefully, we can do it
16 electronically so we don't have to bring everybody to
17 Brooklyn, not that I know most of you are just dying to be
18 in Brooklyn. So we'll be in touch with that once we get the
19 schedule in place.

20 Anything else?

21 MR. TRUSTY: Not for plaintiff, Judge.

22 THE COURT: I have a hand in the background.

23 MR. HAWK: Yes, your Honor. Benjamin Hawk on
24 behalf of United States. For the record, I am
25 representative of the Government's filter team. I did want

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1 to address several things, your Honor.

2 First, the filter team's materials which consist
3 of approximately 520 pages. Pursuant to Judge Cannon's
4 order, those have been provided to plaintiff's counsel as of
5 Friday. I have a courtesy copy here for your Honor both in
6 paper and electronic format if I can provide that to the
7 Court.

8 THE COURT: Please.

9 MR. HAWK: And to the clerk.

10 THE COURT: Thank you.

11 MR. HAWK: May I approach?

12 THE COURT: We are making progress.

13 Okay. Anything else?

14 MR. HAWK: Yes, your Honor. I did want to point
15 out that your Honor asked for with respect to the inventory
16 and the log and the spreadsheet. I just wanted to clarify
17 that the filter materials -- the filter team has already
18 separated those out from the seized materials and we have a
19 separate spreadsheet that we can provide to plaintiff's
20 counsel to take care of those documents with respect to any
21 privilege claims that plaintiff's counsel may have.

22 THE COURT: Much appreciated. I assumed you would
23 set it up that way and I appreciate your offer as I'm sure
24 does Mr. Trusty and his colleagues.

25 Anything else?

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1 MR. HAWK: That's it, your Honor. Thank you.

2 THE COURT: Thank you, folks. I appreciate your
3 time.

4 MS. EDELSTEIN: One more quick thing.

5 With respect to the affidavit that the Court
6 contemplates the Government official providing tomorrow with
7 respect to the inventory. Would it be okay in the public
8 version to redact the agent's name signing that declaration?

9 THE COURT: Yes.

10 MS. EDELSTEIN: Thank you.

11 THE COURT: For the time being, sure. Thank you.
12 (WHEREUPON, this matter was adjourned.)

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CERTIFICATE OF REPORTER

17

18

I certify that the foregoing is a correct transcript of the
record of proceedings in the above-entitled matter.

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Anthony D. Frisolone, FAPR, RDR, CRR, CRI
Official Court Reporter

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