

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF FLORIDA
 FORT PIERCE DIVISION
 CASE NO. 22-81294-CIV-CANNON

DONALD J. TRUMP,

Plaintiffs,

FORT PIERCE, FLORIDA

vs.

SEPTEMBER 1, 2022

UNITED STATES OF AMERICA,

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Defendants.

TRANSCRIPT OF MOTION TO APPOINT SPECIAL MASTER HEARING
 BEFORE THE HONORABLE AILEEN M. CANNON
 UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: CHRISTOPHER KISE, ESQ.
 Chris Kise & Associates
 JAMES TRUSTY, ESQ.
 IFRAH, PLLC
 EVAN CORCORAN, ESQ.
 Silverman, Thompson, Slutkin
 & White, LLC
 LINDSEY HALLIGAN, ESQ.

FOR THE DEFENDANT: JAY BRATT, ESQ.
 TONY GONZALEZ, ESQ.
 JULIE EDELSTEIN, ESQ.
 SOPHIA BRILL, ESQ.
 TONY LA COSTA, ESQ.
 BENJAMIN HAWK, ESQ.
 U.S. Department of Justice

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P-R-O-C-E-E-D-I-N-G-S

1
2 THE COURTROOM DEPUTY: Calling case number
3 22-CV-81294, Donald J. Trump versus United States of America.

4 Counsel, please state your appearances beginning with
5 the plaintiff.

6 MR. KISE: Good morning, Your Honor -- good
7 afternoon, Your Honor; Christopher Kise on behalf of
8 President Trump.

9 MR. TRUSTY: Good afternoon; Jim Trusty on behalf of
10 President Trump.

11 MR. CORCORAN: Good morning; Evan Corcoran on behalf
12 of President Trump.

13 MS. HALLIGAN: Good afternoon; Lindsey Halligan on
14 behalf of President Trump.

15 THE COURT: Good afternoon.

16 MR. BRATT: Good afternoon; Jay Bratt on behalf of
17 the United States.

18 MR. GONZALEZ: Good afternoon, Your Honor; Tony
19 Gonzalez on behalf of the United States.

20 MS. EDELSTEIN: Good afternoon, Your Honor; Julie
21 Edelstein on behalf of the United States.

22 MS. BRILL: Good afternoon, Your Honor; Sophia Brill
23 on behalf of United States.

24 THE COURT: Good afternoon, everybody. You may be
25 seated. Masks are optional.

1 Before we proceed, I want to go over an important
2 ground rule, and that is, of course, the prohibition on
3 recording this proceeding both in audio and video. That
4 requirement stems from local Rule 77.1.

5 I also hereby order that no one, including members of
6 the media, should be using any form of social media to transmit
7 any information live during this proceeding, and that includes
8 directing anybody outside of this courtroom to do that for you.
9 So pursuant to the Court's administrative order, appropriate
10 action will be taken in the event that anyone is not in
11 compliance; and the Court, of course, is monitoring that so I
12 trust everybody will comply.

13 We are here, of course, to hear argument on the
14 plaintiff's motion for judicial oversight and additional
15 relief. I have reviewed that motion along with the full
16 record, including the government's response, the plaintiff's
17 reply, and the additional submissions that have been brought
18 before the Court. As a matter of housekeeping and pursuant to
19 the government's representation that it does not oppose the
20 release of the more detailed inventory to Plaintiff, that
21 document has been made available to Plaintiff prior to this
22 hearing.

23 Who will be leading the argument for the government?

24 MR. BRATT: Your Honor, I will be going first, though
25 I am splitting the argument with Ms. Edelstein.

1 THE COURT: Okay. Well, then, let me just inquire of
2 you, sir. Do you have any objection to unsealing that more
3 detailed inventory?

4 MR. BRATT: No, Your Honor.

5 THE COURT: Okay.

6 Any objection from Plaintiff's counsel to unsealing
7 the inventory alone?

8 MR. KISE: No, Your Honor.

9 THE COURT: Okay. Then by separate order following
10 this hearing that document will be unsealed.

11 There also was filed a status report, one for the
12 case review team and one for the filter team.

13 Mr. Bratt, do you have any objection to turning over
14 to Plaintiff the status report for the investigation team? My
15 review of it is that it does not contain any substantive
16 information that is different from what has already been
17 publicly filed.

18 MR. BRATT: Yes, that is correct, Your Honor. We
19 have no objection.

20 THE COURT: All right. I'm going to ask my clerk to
21 please make that document available to Mr. Kise and his team.
22 It is docket entry 39.

23 Mr. Kise, any objection to unsealing that document?

24 MR. KISE: Just one moment, please, Your Honor.

25 THE COURT: Yes.

1 MR. KISE: No objection, Your Honor. Thank you.

2 THE COURT: All right. Well, then, that document,
3 which is the investigation team status report, docket entry 39,
4 will be unsealed by separate order following this hearing.

5 So the final issue then is the status report filed by
6 the filter review team, and I'm referring only to the status
7 report not to the exhibits that were accompanying that status
8 report.

9 Mr. Bratt or anybody from the government, I would
10 like to know your position on making that available to
11 Plaintiff's counsel.

12 MR. BRATT: So, Your Honor, we have the two filter
13 attorneys present here. We have not seen it; and, certainly,
14 our main concern would be that there was nothing in there that
15 would then get out and taint members of the investigative side.
16 So I would defer to them as to whether the whole document can
17 be unsealed and provided to Defense or whether only a portion.
18 I'm sort of speaking blindly about it.

19 THE COURT: All right. I'll ask that whoever is
20 representing the filter team come to counsel table.

21 MR. LACOSTA: Good afternoon, Your Honor; Tony
22 Lacosta on behalf of the United States.

23 THE COURT: Good afternoon.

24 MR. LACOSTA: Request permission, may I sit here?

25 THE COURT: Yes, please.

1 MR. BENJAMIN: Benjamin Hawk on behalf of the United
2 States.

3 THE COURT: Good afternoon.

4 My question, Mr. Lacosta, is directed only at the
5 status report not exhibits A or B. What is your position with
6 respect to making that available to Plaintiff's counsel?

7 MR. LACOSTA: Your Honor, we have no objection with
8 the pleading itself being made to Plaintiff's counsel, both the
9 pleading, exhibit A and exhibit B, but we would ask that it
10 remain under seal.

11 THE COURT: Okay. So for now, please, I'll ask my
12 team to make those documents available to Plaintiff's counsel.
13 And because those are lengthier, I'm going to take a 15-minute
14 break for Plaintiff's counsel to review them.

15 The Court is in a brief recess.

16 THE COURTROOM DEPUTY: All rise.

17 (Recess was had at 1:11 p.m.; and the proceedings
18 Resumed at 1:26 p.m.)

19 THE COURT: You may be seated.

20 All right. Has Plaintiff's counsel had enough time
21 to review that status report?

22 MR. KISE: We have, Your Honor.

23 THE COURT: Okay. What is your position on the
24 unsealing of the report itself, minus the exhibits?

25 MR. KISE: Your Honor, respectfully, we think that

1 both the report itself and the exhibits should remain under
2 seal at this time. The report itself does make some
3 substantive references to privileged material; and, in an
4 abundance of caution, we want to make sure that we don't get
5 into a situation where there is a waiver claim of some kind.
6 So, respectfully, we would ask the Court to keep it under seal.
7 There may come a time, after we understand a little bit more,
8 where that position could change; but certainly for now, Your
9 Honor, we don't want to have a waiver situation.

10 THE COURT: Okay. Well, seeing as it is a joint
11 request at this point to continue the seal as to the filter
12 review team status report and associated exhibits, that
13 document will remain under seal, and the parties should be
14 careful to adhere to that in their presentation today.

15 With that, let's commence the substantive portion of
16 this hearing. What I had in mind was to give each side
17 approximately ten minutes to present any overview argument; and
18 then, of course, the Court will have questions as we go along.
19 But if either said has a different proposal, I am happy to hear
20 any suggestions.

21 MR. KISE: No, Your Honor, that's fine.

22 THE COURT: Mr. Bratt?

23 MR. BRATT: That is fine, Your Honor.

24 THE COURT: Okay. Well, then, let's commence with
25 Plaintiff's counsel, since it is your motion.

1 MR. KISE: Thank you, Judge; I'll be brief. Again,
2 Christopher Kise on behalf of President Trump. As I mentioned,
3 with me is Mr. Jim Trusty who will handle the balance of the
4 argument; in the main, Evan Corcoran and Lindsey Halligan.

5 Your Honor, just briefly, you are in a challenging
6 but yet, respectfully, a unique position to restore order, to
7 help restore public confidence in the impartial administration
8 of justice. You know, the temperature is very high on both
9 sides here, very high. There is a significant lack of trust
10 between the parties. And I'm not speaking out of turn and I'm
11 not being accusatory, I just think there is. I think it is
12 evident from what you see out in the public eye.

13 There is a real or perceived lack of transparency.
14 Again, not being critical or commenting on that, but just there
15 is. There is this perception that this isn't going the right
16 way. The media is here beating the door down. And from the
17 media reports, there is a real or perceived lack of -- a public
18 lack of faith in the integrity of the administration of
19 justice. This is an unprecedented situation. We need,
20 respectfully, to lower the temperature on both sides. We need
21 to -- we need to take a deep breath and place this into
22 perspective.

23 What we are talking about here, in the main, are
24 Presidential records in the hands of the 45th President of the
25 United States at a location that was used frequently, during

1 his term as President, to conduct official business.

2 This is not a case about some Department of Defense
3 staffer stuffing military secrets into a paper bag and sneaking
4 out into the middle of the night. This is, as I say,
5 Presidential records in the hands of 45th President of the
6 United States.

7 The inventory, in fact, that was just provided and
8 unsealed demonstrates that, the first inventory. It is what
9 you would expect, when you look at it. It is what you would
10 expect if you looked through a bunch of boxes that were moved
11 in a hurry from a residence or an office. It contains all
12 sorts of things. And in there are, again, Presidential records
13 in the hands of 45th President of the United States.

14 The appointment of a special master here is going to
15 help identify the real issues. It is going to help place those
16 issues in the proper context. It is going to give the parties
17 and the Court an orderly path towards resolution of those
18 issues. And perhaps most importantly, Your Honor, I believe,
19 respectfully, it is going to give the American people a greater
20 confidence in the integrity of this process.

21 Mr. Trusty is going to handle the balance of the
22 argument. Thank you.

23 THE COURT: Thank you.

24 MR. TRUSTY: Your Honor, good afternoon; pleasure to
25 meet you. Thank you for your expeditious treatment of this

1 matter and setting a schedule that allowed us to move quickly
2 in the interest of justice. And again, it is an honor to
3 appear in front of you.

4 Your Honor, I want to just make a few comments based
5 on really the developments of the last few days and
6 particularly talking about the pleading from the government.
7 And really what we can read into that, I think fairly, as a
8 matter of inference, the government's strategy at this point,
9 when it comes to the very limited notion of appointing a
10 special master is simply to ask the Court, "Move on, we are in
11 control, we know what we are doing, leave us alone."

12 It is an extraordinary moment. It is one thing to
13 have that attitude towards counsel for the President and say,
14 "Sorry, guys, we are not going to talk" -- and I'll come back
15 to that in a moment, but the idea of pushing off this really
16 modest idea of appointing a special master is extraordinary.
17 And some of the things we see in their pleading really
18 underscores the incredibly, extraordinary, historic -- and I
19 don't mean that in a good way -- nature of the Government's
20 conduct.

21 The first is that in the pleading from two days ago,
22 we now have this allegation that if Your Honor has the temerity
23 to appoint a special master, from their perspective, that it
24 will interfere with this newly facilitated office -- ODNI
25 investigation into the classification of materials, literally

1 telling the Court that "you can't possibly allow for a special
2 master to get involved because it is going to interfere with
3 what we are doing; again, leave us alone."

4 We had this phenomenal argument about standing which
5 would absolutely turn the Fourth Amendment on it's head in
6 terms of established case law for many years and certainly the
7 idea of fruits of a poisonous tree. The Government is now
8 trying to suggest to the Court that as long as they find
9 something they deem illegal, that there is no recourse for an
10 unconstitutional intrusion; that the finding of some sort of
11 contraband, from their perspective, allows them to go scot-free
12 from any assessment of Fourth Amendment law. That's an amazing
13 concept for them to put in writing in this brief. I think it
14 speaks volumes as to this ends justify the means mentality that
15 is being employed. And so the standing argument which was a
16 shocker remains a shocker.

17 And what they have done in their briefing is they
18 have essentially had a narrow inquiry from the Court saying,
19 "Please give me your position on the idea of appointing a
20 special master."

21 And they said, "Well, we want to go ahead and run the
22 table and tell the Court, leave us alone, we know what we are
23 doing, and this is for all time; there is no such thing as Rule
24 41, no such thing as standing, no such thing as castle
25 doctrine; you know, when your home is invaded by armed agents,

1 you have nothing to say about it."

2 And what is extraordinary is not just that this is
3 involving a President of the United States and his residence, I
4 mean, it really makes you step back and think, what if it is
5 just some guy that is faced with an attorney general or maybe a
6 local equivalent, a state's attorney, a U.S. attorney,
7 announcing publicly, I don't want to unseal the stuff I like
8 about this search warrant, I want to unseal the warrant to show
9 that it's really serious charges from our perspective, and I
10 want to unseal the inventory or at least this partial inventory
11 that they originally had and say, you know, look at the dirt we
12 found, it justifies everything we did.

13 To have -- I mean, I have been around prosecution and
14 criminal justice for 30-something years, longer than I want to
15 admit maybe, but to have any Executive Branch official publicly
16 announce, I'm ready to unseal these documents at the expense of
17 any defendant, much less like a marginalized defendant, any
18 defendant is an amazing moment. It is an extraordinary moment.
19 It calls out for some questioning of what the motivation is
20 here and whether or not we, as a criminal justice system,
21 should allow completely unfettered conduct to go unchecked,
22 unobserved, unmonitored.

23 Now, as it turns out, our client was perfectly happy
24 with the notion of transparency. He doesn't just say it in his
25 speeches, he actually means it and says, "If they want to let

1 that stuff loose, let it go loose; how about the affidavit
2 too," and that will be the subject of another conversation, at
3 some point, about the affidavit. But you have this selective
4 leaking and disclosing on behalf of the Government.

5 You even have what happened two days ago, the
6 insertion in a motion about the special master of a perfectly
7 staged photograph of classified covers on documents. I mean,
8 how that was supposed to help the Court decide the issue of
9 special master is beyond me. It was obviously a press release
10 within their motions response. And this is the type of unusual
11 conduct we are seeing left and right in this case that cries
12 out for some modest measure of government -- I'm sorry, of
13 judicial intervention.

14 I want to spend a minute on the filter team. It is
15 great to actually see them.

16 Now, in a normal situation with a filter team, yes,
17 there is going to be communications back and forth with the
18 Court. We are not saying there is anything wrong with the
19 notion of a filter team filing reports with the Court. But
20 what normally happens in the practice of filter examinations is
21 the other side of the aisle gets a phone call, and it is
22 somebody that says, Hey, I'm Fred Smith, I'm from the U.S.
23 Attorney's Office or I'm from a different section of main
24 justice and I'm on the filter team; we are doing this search to
25 look for whatever -- in this case, they limited it to

1 attorney-client and work product -- and then there is
2 communication and you get a sense of when are they going to be
3 done, are there documents that they want our opinion on.
4 Frankly, the beginning is not just the investigative team
5 saying, here is a list. They go to the attorneys and say, who
6 shall be we looking for that might implicate privilege. We
7 never had that courtesy.

8 So we have filter team that announces to the Court
9 through these pleadings of two days ago and now today that,
10 "Trust us, we have done everything; we are done, and we never
11 involved the other side for any bit of communication." And
12 again, I can tell the Court, that's just not how filter teams
13 normally work. There is some notice to the other side that,
14 hey, we have some documents we should talk about; we have some
15 documents to return; we have documents we want you to tell us
16 if you think they are privileged. We didn't have any of that.
17 And it is not a function of counsel sitting here and being
18 concerned on a courtesy level or personal feelings or ego, this
19 is just another sign of the extraordinary conduct that the
20 Government wants to engage in for this particular
21 investigation.

22 At the end of the day, what they are left with is
23 telling the Court, along with these new fangled theories about
24 standing, that it would be somehow wrong to have any level of
25 involvement now or in the future. And the reality is, if we

1 step back and think about it, what is the harm that they are
2 worried about? What possibly could justify this kind of
3 vehement objection and recreation of Fourth Amendment law
4 because they don't want any bit of involvement? They don't
5 want a neutral respected, maybe mutually selected even third
6 party to take a look at the same documents and make sure they
7 got it right, or to look at the same documents and make
8 determinations, as we should be doing under the Presidential
9 Records Act and figure out whether these are personal or
10 Presidential records. They are creating a different rule for
11 this case than anything that we have ever seen.

12 So I know I'm running short on time, and I'll try to
13 cut it short and hopefully return when the Court has questions;
14 but, I would suggest to the Court that all we are talking about
15 today is a very modest step that the Court forecast as a
16 possibility with your recent order, which is the appointment a
17 special master. There will be work to do nonetheless.

18 THE COURT: To do what exactly?

19 MR. TRUSTY: Well, first thing which was solved today
20 which was to get an actual inventory. So we appreciate that
21 that was taken care of by the Court in unsealing that
22 inventory. The next logical step would be to allow us to
23 actually examine the documents and other items that were seized
24 in this search. And frankly, the way the communication has
25 been, we think we need involvement on some level, the judge or

1 your designee, to make that happen in an expeditious fashion.

2 We also think the special master could be in a
3 position to address and should address not just attorney-client
4 and work product issues and resolve those or at least recommend
5 resolutions of those, but to deal with the overarching paradigm
6 here that actually matters that they are trying to criminalize
7 which is the judicially unenforceable Presidential Records Act.
8 In other words, the classifications for that are entirely about
9 Presidential or personal with no specific regard for
10 classification. And that's another division that could be
11 helpful in terms of guiding the litigation and hopefully arming
12 the Court with information over time, as we try to litigate
13 these matters.

14 THE COURT: Are you asserting any other privileges
15 beyond the attorney-client privilege?

16 MR. TRUSTY: Well, we are not conceding the fact of
17 classification, I should make that one hundred percent clear,
18 in terms of whether any of these items remain classified. We
19 would assert attorney-client and work product. Of course, we
20 are not privy to any individual document yet, so I can't give
21 you any sort of play by play. Beyond that, I suppose I don't
22 expect other privileges to kick in, but I don't --

23 THE COURT: So I just want to be clear, there were
24 some references in the papers to executive privilege, you know,
25 some resistance from the Government as to the assertion of

1 that, so I do want to clarify exactly what privileges are being
2 asserted by the Plaintiff in this case, for the purposes of the
3 appointment potentially of a special master.

4 MR. TRUSTY: Absolutely. Thank you, Your Honor.
5 Certainly, our pleadings have covered that better than I just
6 did.

7 Yes, executive privilege is in play, as well. The
8 problem that we have in terms of any specific assertion is that
9 we haven't had access to the actual materials. But I can tell
10 you without again, I think, burning anything from what we have
11 recently seen, some of the recent materials that we have just
12 received continue to alarm us about several different levels of
13 privilege. So yes, executive privilege is in play; yes, we
14 think that all of these classifications of the Presidential
15 Records Act and the notion of executive privilege are things
16 where a special master logically could wade in and help resolve
17 for this Court in an expeditious fashion, so we would welcome
18 that kind of assessment.

19 THE COURT: All right. I'll have more questions
20 later.

21 MR. TRUSTY: Thank you, Judge.

22 MR. KISE: Your Honor, may I? I just have one minor
23 thing. I didn't want to jump up, when Mr. Trusty was speaking.
24 But to answer your question about privileges that we are
25 asserting, I think that there is also an issue potentially

1 under 44 U.S.C. 2204, which there are restrictions on access to
2 Presidential records. I'm not sure how that fully applies here
3 because we don't have, you know, a full understanding of the
4 documents; but, that may become an issue and I just want to
5 make sure that we note that in response to your question.

6 Thank you.

7 THE COURT: All right, thank you.

8 Mr. Bratt.

9 MR. BRATT: Yes, thank you, Your Honor.

10 One thing that would, I think, undermine most of the
11 confidence in the administration of justice is that the Court
12 doesn't follow the standards and laws for where we are
13 procedurally in this case. And where we are procedurally is we
14 have a pre-indictment challenge to a search warrant and a
15 search; and, at this procedural stage, the rights of the person
16 who may be aggrieved are very limited. And under -- and there
17 really are two bases for the Court's jurisdiction and
18 particularly with respect to asserting jurisdiction over the
19 classified records and other Presidential records.

20 Now, Ms. Edelstein will talk about executive
21 privilege, and she will also talk about the propriety of
22 special masters, and she will handle the issue of
23 attorney-client privilege because that is a bit different from
24 the classified and other Presidential records.

25 But with respect to the classified and other

1 Presidential records, there are only two bases that this Court
2 has jurisdiction at this pre-indictment stage. One is Rule
3 41(g), and we believe this is a truly 41(g) motion; or second,
4 the Court can exercise a second or anomalous jurisdiction. To
5 do that, that then triggers certain inquires the Court must
6 make, and it also triggers certain burdens on them to establish
7 that they satisfy those standards.

8 The civil cover sheet to this matter references
9 Rule 41(g). There are frequent references throughout
10 Plaintiff's briefs to Rule 41(g), and we believe that what they
11 have really done is brought a Rule 41(g) motion. And if the
12 Court interprets and reads and applies Rule 41(g) strictly,
13 they cannot get a special master or the relief that they seek,
14 and that's because the key factor that must exist for a party
15 to bring a Rule 41(g) motion is that the party has a possessory
16 interest in the property at issue.

17 And let me describe what the former President has as
18 Presidential records that the 45th President took. He is no
19 longer the President; and because he is no longer the
20 President, he did not have the right to take those documents.
21 He was unlawfully in possession of them; and because he has no
22 possessory interest in those records, that ends the analysis
23 under Rule 41(g). If, however, the Court looks to assert
24 jurisdiction --

25 THE COURT: Doesn't that put the cart before the

1 horse though? I mean, you are essentially asking, for purposes
2 of the Fourth Amendment, to say there is no reasonable
3 expectation of privacy in the context of the search involving
4 premises that are unquestioningly controlled by the former
5 President. So as a matter of the Fourth Amendment, if that's
6 the sort of standing argument you are trying to bring, I'm
7 unclear why now we would have to determine the proper ownership
8 of those records.

9 MR. BRATT: Because, Your Honor -- well, two
10 responses. One, the reasonable expectation of privacy has been
11 overcome by the issuance of a warrant supported by probable
12 cause; but, second, the sort of standing that Your Honor is
13 talking about and that Mr. Trusty was referencing, that's the
14 standing that you have after there have been charges and you
15 are seeking to suppress the fruits of search. The sort of
16 standing or jurisdiction that you have to have right now
17 pre-indictment as set forth in Rule 41(g), as set forth in the
18 *Howell* case, and as I'm about to talk with respect to the
19 equity jurisdiction *Bennett* case that Judge Rosenbaum decided
20 when she was a judge here, that is very limited. And whether
21 you call it "standing" or "jurisdiction," they do not have it
22 here. And in order to get the jurisdiction or standing under
23 Rule 41(g), that is a key requirement. In fact, it is the key
24 requirement, that you have a possessory interest in a property.
25 If, at a later point, the Fourth Amendment -- potential Fourth

1 Amendment violations need to be vindicated, that is done
2 through a motion on suppression. It is not done through a
3 Rule 41(g) motion pre-indictment.

4 THE COURT: You don't dispute one can bring a civil
5 action in equity for the return of property pre-indictment
6 assuming the equitable factors and consideration to counsel in
7 favor of such an action.

8 MR. BRATT: I do agree with that; but under the
9 *Richey* factors and to go through them -- and actually, I was
10 going to start with the first, callus disregard for Plaintiff's
11 constitutional rights, I will get back to that. But the second
12 *Richey* factor is that Plaintiff must have an interest in and
13 need for the property, and this plaintiff does not have an
14 interest in the classified and other Presidential records. So
15 under *Richey*, that, in and of itself, defeats or should point
16 the Court to decline to exercise its equitable jurisdiction.

17 On the topic of callus disregard for Plaintiff's
18 constitutional rights, there was a warrant here. Judge
19 Reinhart both at the hearing two weeks ago and in his order
20 reiterated that he found there was probable cause, valid
21 probable cause for the warrant. There was a search that was
22 done, and we believe that what was seized was limited to what
23 was within the scope of the warrant. They have put forth no
24 evidence that there was any disregard of the -- of the former
25 President's rights.

1 The third factor under *Richey* is irreparable injury;
2 and again, we don't know what the injury is with respect to the
3 classified and other Presidential records. They aren't his,
4 especially the classified weren't being properly stored. Do
5 they -- are they potentially incriminating? Yes, they are
6 potentially are, but that isn't the type of irreparable injury
7 that the courts look at in equity.

8 And then in addition, the last factor is, well, there
9 is no adequate remedy at law, and that's what we have been
10 discussing. There is an adequate remedy of law later through a
11 suppression motion.

12 There are also, you know, three I think very
13 important, overarching factors that the courts emphasize when a
14 judge in your position is being asked to exercise equity
15 jurisdiction for return of property. One is that the exercise
16 of that jurisdiction must be with caution and restraint, and it
17 must be exercised only to prevent a manifest injustice; and the
18 third, any time a party comes to equity, the party must have
19 clean hands. And here, the former President being in unlawful
20 possession of classified and other Presidential records, that
21 is a text book example of unclean hands.

22 I will rest on what we say in our pleadings with
23 respect to the injunction and to personal items, but I will now
24 turn it over to Ms. Edelstein to address the other issues.

25 THE COURT: All right.

1 MS. EDELSTEIN: Good afternoon, again, Your Honor.

2 I'm going to address the issues specific to the
3 appointment of a special master. As a starting point, under
4 the Federal Rules of Civil Procedure, special masters are not
5 generally favored. On the other hand, the rules assume that in
6 most circumstances, the court, whether it be the district court
7 or the magistrate judge, is equipped to handle such issues.

8 Having been apprized of the status of both the
9 investigative review and the filter team review in this case, I
10 think it is especially clear why the appointment of a special
11 master would not be appropriate and only serve to cause delay
12 to both parties.

13 I want to turn to both the issues surrounding
14 executive privilege and also the attorney-client privilege.
15 Plaintiff in this suit has said that the request for a special
16 master would be modest. On the executive privilege issues, it
17 would not be modest, it would be unprecedented.

18 THE COURT: Why is that?

19 MS. EDELSTEIN: There is no role for a special master
20 to play in executive privilege, and that is why it has not been
21 done in the past.

22 THE COURT: Isn't that also because there has never
23 been a seizure of this magnitude of a former president?

24 MS. EDELSTEIN: On the executive privilege issues, I
25 think it is very telling that in the three briefs that

1 Plaintiff has filed and in addressing the Court, they have
2 never grappled with the case of *Nixon versus GSA*. Even if they
3 could assert that claim of executive privilege, which we don't
4 concede, their argument that it could be successfully asserted
5 is foreclosed by that case.

6 THE COURT: I don't know if that's right. It seems
7 to me like you are potentially overreading *Nixon*; and to say
8 now that there is absolutely no room for a former executive to
9 raise a claim of executive privilege, at least for some period
10 of time, is not entirely decided in the law, so I'm not sure it
11 is as cut as dry as you suggest.

12 MS. EDELSTEIN: So even if they could raise it which
13 we don't concede, under these circumstances, there is no way
14 that such a claim could succeed.

15 And let me back up a little bit because during the
16 Plaintiff's argument, they characterized this case as "just a
17 former president in possession of his records." The first
18 issue with that is they are no longer his records. We need to
19 look at the applicable law here, the PRA; and despite a lot of
20 allegations made by the Plaintiff, we really need to focus in
21 on the legal provisions at issue. The PRA makes it very clear,
22 in 2202, that these records belong to the United States.
23 Presidential records belong to the United States. Importantly,
24 in 2203(g)(1), upon conclusion of the term of the President, it
25 is the archivist that assumes custody and control of the

1 Presidential records. The records at issue were not his, at
2 the time that the search warrant was authorized and the search
3 occurred, and he does not have a property interest in those
4 records anymore. And in terms of just it being a former
5 president in possession of his records, some of those records
6 included the most highly classified information of the United
7 States. There are very specific provisions in the Code of
8 Federal Regulations that govern the storage of that property,
9 and it is undisputed that at least after the end of the former
10 President's term, there was no place at that property that was
11 authorized for the storage of those records.

12 We also have the issue here that the former President
13 blatantly disregarded the provisions of the PRA and is now
14 trying to rely on it to accomplish what he seeks here. But not
15 having turned over the records to NARA, he can't do that. And
16 the procedure set out in the PRA do not apply because the
17 records are not in NARA's possession as they should have been.

18 Notably, there is also a venue provision in the PRA
19 and should he be seeking relief under that statute, that suit
20 would have to be brought in the District of Columbia and not
21 here.

22 So getting back to the *Nixon* cases, first, he has not
23 made any assertion of executive privilege in this case and, in
24 fact, has taken a number of actions without making that
25 assertion. He ended up providing some boxes to NARA. There

1 are materials produced pursuant up to a grand jury subpoena.
2 There have been multiple instances, and there has never been a
3 specific invocation of executive privilege.

4 THE COURT: As far as the chronology is concerned, at
5 least in one of the attachments supplied by the Government,
6 there was, I think, a request for more time to determine
7 whether to assert executive privilege, so I don't know exactly
8 if there was an assertion. But the papers, at least that I
9 have been presented with, seem to suggest they are taking that
10 position, that a special master is warranted not only for the
11 attorney-client privilege issues but also for the executive
12 privilege and potentially in addition to resolve categorization
13 disputes that arise between the parties, and I presume that
14 refers to the PRA.

15 MS. EDELSTEIN: So you are referring to what is
16 attachment B to the pleading that the Government filed the
17 other evening, and that is a May 10th letter from the
18 archivist; and in that letter, the archivist clearly explains
19 that the -- it's not a close call here because what the
20 Government was seeking to do was review Executive Branch
21 materials within the Executive Branch, and that's really the
22 key to *Nixon versus GSA*.

23 Also notably, that letter was provided on May 10th.
24 Purposefully, we waited a few days before beginning the FBI's
25 review of that material to give the Plaintiff the remedy he

1 could have sought at that time, which was to bring a suit in
2 the District of Columbia to assert executive privilege over
3 those materials. He did not.

4 Why *Nixon versus GSA* is so important is that it makes
5 clear that the -- that under these circumstances, it would be
6 impossible for him to successfully assert the executive
7 privilege to keep the executive privilege from other parts of
8 the Executive Branch reviewing these materials. It describes
9 the intrusion as very limited, when the materials are staying
10 within the Executive Branch, and we have to look at the very
11 purpose of the presidential privilege.

12 THE COURT: Ultimately, what is the harm in the
13 appointment of a special master to sort through these issues
14 without creating undo delay, to do an orderly fashion receive
15 these materials, receive claims of privilege and go through it
16 giving both sides a full opportunity? I guess what I'm
17 wondering from the Government, you know, is what is your
18 articulation of harm other than just the general concern that
19 it would delay a criminal investigation?

20 MS. EDELSTEIN: First of all, those are very
21 legitimate concerns; and, at the outset, even if there was an
22 appropriate assertion of executive privilege, it is undisputed
23 that the executive privilege is a qualified privilege.

24 THE COURT: Certainly.

25 MS. EDELSTEIN: And there is a balancing test that

1 applies.

2 In terms of the Government's interest, there are
3 multiple very significant legitimate interests. One is the
4 criminal investigation, and under *Nixon versus United States*,
5 that is clearly recognized as a very significant interest, even
6 if the materials had to be provided outside of the Executive
7 Branch which here they don't which shows how limit the
8 intrusion is. It would be unprecedented for the executive to
9 be able to successfully assert privilege against the Executive
10 Branch.

11 And in addition to the criminal investigation which
12 is obviously a legitimate interest, as the Supreme Court has
13 recognized, there is also the ongoing damage assessment by the
14 intelligence community. This is not an effort that we just
15 undertook. In fact, in that same May 10th letter that I
16 referenced, there is an April communication to Plaintiff's
17 counsel that emphasizes that the materials had to be reviewed
18 by the FBI in part so that it could coordinate an assessment of
19 the damage that could have resulted from the improper storage
20 of these materials. And if a special master was appointed at
21 this point, that would -- and the Government was not able to
22 continue --

23 THE COURT: So would your position change, for
24 example, if the special master were permitted to proceed
25 without affecting the ODNI's ongoing review for intelligence

1 purposes but pausing temporarily any use of the documents in
2 criminal investigation? So what I'm saying is no effect on the
3 DNI review, which is ongoing and has been asserted as necessary
4 for national security but then providing a temporary period of
5 time, like I said, for orderly review of the documents seized?

6 MS. EDELSTEIN: It would not change. There is no
7 role for a special master to play in terms of executive
8 privilege, given the posture that we are at --

9 THE COURT: So are you conceding that one would be
10 appropriate for attorney-client?

11 MS. EDELSTEIN: I'm not, I just haven't reached that
12 argument yet, I'm happy to turn to that. And in terms of the
13 attorney-client issues, I am not aware of the contents,
14 obviously, of the status update that was prepared and submitted
15 by the filter team. But my understanding is that the filter
16 team is already in a position to dispose of the materials in
17 accordance with the protocols that we laid out in the search
18 warrant, and it would cause delay to both parties if that
19 weren't allowed to proceed.

20 And again, looking at the cases and the law, it is
21 very telling that the cases that are cited by Plaintiff in
22 their brief, in cases where a special master has been appointed
23 for attorney-client issues, they invariably involve the search
24 of law firm or other law offices, and there is special
25 considerations especially when there could be other clients

1 involved, matters where a U.S. attorney's office may be seizing
2 records in unrelated investigations, and that's simply not the
3 case here. There is one client, and he is not an attorney.

4 So in terms of the special master for attorney-client
5 privilege, that is just not necessary at this point. And as I
6 started with, these are the type of cases where we assume that
7 a district court or magistrate judge on a specially care given
8 the -- what I understand is a modest volume of materials that
9 don't present the thorny issues that are presented in law firm
10 search, we assume that is something that the district court,
11 the magistrate judge would be equipped to handle.

12 THE COURT: All right, thank you very much.

13 I'll give the Government an additional opportunity;
14 but now, I would like to hear from Plaintiff's counsel with
15 focused argument on the *Richey* factors to the greatest extent
16 possible in terms of the equitable considerations.

17 MR. TRUSTY: Your Honor, I think the difficulty in
18 completely jumping through that hoop for the Court in terms of
19 the *Richey* factors is that we are still purposefully blinded
20 from large swaths of information. What we see from our side of
21 the aisle is a warrant that looks like a general warrant and
22 could be subject to challenge under Rule 41.

23 What we also have concerns about is this affidavit
24 that was released in kind of more black than white form that
25 doesn't really tell us whether there were omissions or

1 misstatements that were made to Judge Reinhart in support of
2 this warrant. So there is a --

3 THE COURT: Let me just ask you: What is the
4 irreparable harm that you are asserting? At this point, the
5 Court would be required to, if it did determine that the
6 exercise of equitable jurisdiction is appropriate going through
7 those considerations -- and admittedly, they are considerations
8 only. But nevertheless, what is the Plaintiff's assertion of
9 irreparable harm if the Court does not exercise equitable
10 jurisdiction?

11 MR. TRUSTY: Well, Your Honor, the irreparable harm,
12 frankly, is ongoing, and it's on two different levels I would
13 suggest. The first is that you have a criminalized
14 investigation of a dispute with NARA that historically is
15 unenforceable in terms of judicial enforcement. It is a
16 noncriminal scenario where they anticipate that a president, at
17 any time as a president or after, would have the highest level
18 of access to documents that are in his or her possession. So
19 we are in a situation where, literally, they have taken a -- we
20 have characterized it at times as "an overdue library book
21 scenario" where there is a dispute -- not even a dispute,
22 ongoing negotiations with NARA about archives that has suddenly
23 been transformed into a criminal investigation. So anything
24 that furthers that criminal investigation in terms of their
25 continued access to these documents, to their allegations that

1 there was a need for an ODNI assessment, to the fact that they
2 have confirmed today an ongoing criminal investigation, they
3 should not have the benefit of this information to try to build
4 a criminal case when they were never entitled to walk through
5 the doors and seize any of these items.

6 So this whole idea of whether or not -- I'm heartened
7 to hear that they are starting to acknowledge, perhaps
8 reluctantly, that the Presidential Records Act applies, but
9 they need to realize the whole act applies. I mean, that act
10 anticipates that presidents, even when out of office, are going
11 to have highest level of access to their materials. It also
12 anticipates -- there is language in the act somewhere about
13 12-year classifications on behalf of the President which, by
14 definition, means you are talking about rights of an
15 ex-president, a former president to control the flow of
16 information back and forth with NARA. It is an exercitation --
17 it is a statute that demands cooperation but not judicial
18 enforcement. So there is this direct level of a criminal
19 investigation accessing documents that they are not entitled to
20 have ever seized in the first place.

21 There is also, I would submit, and this is may be a
22 little harder to characterize, but one that I think in the
23 world of equity makes sense, there is a broader concern here
24 for the institution of the presidency, that no matter who is
25 under the gun of a politicized Department of Justice, that

1 equity cries out for looking at the combined actions of this
2 Department in trying to eliminate the Presidential Records Act
3 in favor of criminalizing it. This is something that, your
4 know, fair-minded citizens and I hope jurists, as well, would
5 recognize is a serious institutional threat. Now, can I
6 characterize the harm in some sort of precise way? No, but I
7 don't want to forget the institutional harm of taking this
8 radical approach that the Department is taking. So I think it
9 is literally kind of on a case building level that there is
10 prejudice, but there is, I think, broader historic concerns,
11 and again, belied by all of the little moments of conduct, the
12 challenges about standing, the inability to reach out during a
13 filter team, there is something here that should be looked at.
14 And frankly, I continue to be astounded by the fact that the
15 Department of Justice can't just accept that. They can't
16 accept even a little bit of judicial involvement in a historic
17 and outrageous and inequitable scenario.

18 THE COURT: Why couldn't you just presumably wait to
19 challenge these matters in a future proceeding, if one ever
20 materializes?

21 MR. TRUSTY: Right. Well, is it true that we could
22 have *Franks* hearing and a motion to suppress for a general
23 warrant some day? Sure. Obviously, the damage is done for any
24 citizen, at that point; that means they have been indicted.

25 The model that's being proposed to you on behalf of

1 the Government is one that completely guts Rule 41. We have a
2 mechanism, not even just equitable principles in general or
3 court inherent supervisory authority, but we have a statutory
4 mechanism for pretrial challenges to warrants. It specifically
5 refers to the language of the Fourth Amendment, "unreasonable
6 searches and seizures." That's what we are talking about here.
7 The Government wants to ignore that. They want to say look
8 away, it doesn't apply; but, it applies to President Trump just
9 like it would anybody.

10 So Rule 41 is the ultimate mechanism we are talking
11 about to try to return property and essentially -- not directly
12 by way of a suppression, but essentially invalidate the conduct
13 of this Government. That could be based on the way they short
14 circuited the Presidential Records Act in their search warrant.
15 Of course, we would have to see the affidavit to be able to
16 fully brief that. It could be based on the general nature of
17 the warrant.

18 The Court will probably recognize -- I'm not asking
19 for an opinion -- that the warrant itself not only allows for
20 gathering papers around their classified materials seizure,
21 which again we even dispute whether it is classified or whether
22 they are entitled to seize it or whether it is in the right
23 paradigm, but boxes in the vicinity, documents in the vicinity.
24 I mean, this was a colonial time search where the agents had
25 discretion to take anything they want. And maybe they did, we

1 are still trying to get through a legitimate inventory to
2 figure that out. But there are significant substantial
3 preliminary showings that this is a warrant that is suspect.
4 And I can just tell the Court that our intention is to explore
5 that, get the classifications through a special master and Your
6 Honor that we can get, in terms of what the universe of items
7 are, and pursue ideas like seeing the affidavit, maybe not for
8 the general public, but at least for counsel to properly
9 prepare for a Rule 41 and then litigating a Rule 41. This is
10 what the rule is all about. It doesn't matter whether it is a
11 president or guy on street corner in Baltimore, they have that
12 right to challenge this preliminarily.

13 THE COURT: And then why would you wait 14 days to
14 file the motion seeking -- I did read there were perhaps
15 informal discussions for the Government's consent to one, but I
16 would like to hear more about that issue in particular, so
17 please proceed.

18 MR. TRUSTY: Right. Your Honor, again, not to
19 alienate the Court on this issue, part of that I don't think I
20 can disclose. As with any kind of decision about the timing of
21 filing, the nature of filing, some of that is going to,
22 unfortunately from where I stand right now, fall into a
23 category that I'm not comfortable sharing in open court. But I
24 would also say more fundamentally, we were trying to have
25 communications with the U.S. Attorney's Office. We had

1 multiple communications early. We asked them what their
2 position would be on a special master. We were hopeful that
3 there would be some transparency that carried through to really
4 let us assess what was seized, how it was seized, what the
5 basis of the affidavit was, and then we wouldn't have to get to
6 this point of involving the Court. So there was some period of
7 time. I don't want to say, you know, 12 days, two days, 14
8 days, but some of this was effectively exploring whether we
9 were going to have a level of cooperation that allows us to not
10 defer to, you know, to run to the Court for assistance.

11 There are other factors as well, but I think that's
12 kind of the cleanest way I can address it for Your Honor.

13 THE COURT: Finally, in your estimation, in
14 consideration of the potential need to appoint a special
15 master, is there a need for the Court to conduct a formal
16 Rule 65 analysis for injunctive relief insofar as there may be
17 a need in conjunction with the appointment of a special master
18 in part and parcel with that to temporarily enjoin the use of
19 the documents for criminal investigative purposes without
20 affecting the DNI's review?

21 So my question is: Does the Court -- or should the
22 Court be conducting a formal Rule 65 inquiry baked into the
23 special master assessment?

24 MR. TRUSTY: I don't see any harm from that, from our
25 perspective, because in the context of "baking it in," you are

1 trying to balance competing interests of parties.

2 And as to ODNI component, I would just suggest, yeah,
3 you know, we have this old school notion presented to the Court
4 that, you know, if somebody is in the room looking at the
5 documents, that's going to tie it up and nobody else has
6 access. I mean, I think they could actually copy some of these
7 documents to allow for ODNI review. This notion that suddenly
8 a special master physically obstructs them from being able to
9 do their review seems antiquated to me. But, you know, we are
10 happy to brief that issue supplementally, since I don't think
11 we really touched it directly. But again, we welcome multiple
12 bases for involvement, and the idea for stopping this runaway
13 train on its tracks while the Court and the special master get
14 their opportunity to assess things I think makes sense.

15 THE COURT: And so, finally, when you say "assess
16 things," in the most precise way possible, what do you envision
17 and contemplate the special master actually doing with respect
18 to review of documents broadly?

19 MR. TRUSTY: I believe the special master would --
20 again, first thing has been taken care of, we think. We
21 haven't had a long time to look at it, but we think the idea of
22 a more detailed particular compliant inventory is kind of off
23 the list. That's great.

24 Practically, the idea of stopping the initial review
25 has been mooted by the way that they have been so expeditious,

1 and they've even turned over materials to the trial team. But
2 I think that the special master would be in a position to fully
3 assess the current privileged classifications that have been
4 made, to again involve our -- get our involvement in this, as
5 well, which is overdue, in identifying which documents might
6 fall within the privilege. We think the special master will be
7 in a position to assess personal versus Presidential documents
8 under the framework of the PRA and executive privilege. We
9 think all of that is the type of thing it would be, I suspect,
10 economical and make sense to be conducted along with the
11 physical review of the documents to throw that to the special
12 master, allow us to use that time. Ultimately, there may well
13 be reasons to come back to this Court, but I think that's an
14 efficient model for getting to a bottom line of where we
15 disagree and where we agree, if anywhere, when it comes to the
16 classification of all of these seized materials.

17 I know that wasn't nearly as pithy as Your Honor
18 wanted, but I just wanted to make sure I covered that.

19 THE COURT: Any response from the Government?

20 MR. BRATT: Yes, Your Honor.

21 On the Rule 65 question that the Court asked, if --
22 and that would actually have been a clarification, if the Court
23 were to say that only ODNI can have access to the records to do
24 its damage assessment and that the Government and the FBI has
25 to stop doing that, then I'm assuming the Court is enjoining

1 us, and the Court would have to make the findings that are
2 necessary under Rule 65.

3 THE COURT: And what authority do you have for that?

4 I have seen the special master orders that include a
5 component of injunctive relief without officially going through
6 a Rule 65 inquiry. Logically, the idea being that the special
7 master would go first, effectively review the documents, go
8 through them orderly, receive, and recommend; and then
9 following that review, turn over the materials back to the
10 Government. So I think in that sort of logical sequence, why
11 would a Rule 65 inquiry be essential?

12 MR. BRATT: Because as Ms. Edelstein pointed out,
13 those cases are different. They involve attorney-client
14 information. They involve possible taint. They involve Sixth
15 Amendment --

16 THE COURT: But there is no dispute that there are at
17 least 100 or so if not more documents that have been marked at
18 least as "potentially privileged."

19 MR. BRATT: I don't know, so I --

20 THE COURT: Okay. But I think the public
21 representations are that there are materials that have been
22 designated as "potentially privileged," there is no dispute
23 about that.

24 MR. BRATT: There is no dispute about that.

25 So I will separate the attorney-client, because I do

1 think that raises different issues from the special master
2 filtering and still not quite understanding how it would filter
3 for executive privilege, particularly if it is a privilege that
4 cannot be asserted against the current executive.

5 But the difference with the attorney-client matters
6 are, you know, for all of the reasons that courts have ordered
7 a special master, you know, searches in law firms or attorneys,
8 those -- those don't exist with respect to the Presidential
9 records. And I will tell the Court, you know, how it does slow
10 down because in addition to the damage assessment that ODNI is
11 doing, in any retention case, as we call these types of cases,
12 in any illegal retention case under the Espionage Act, we also
13 start looking at, all right, are these documents still
14 classified? So there is a classification review.

15 Classification is different from national defense information
16 under the case law, okay. So even if it is classified, does it
17 contain national defense information even if it is not
18 classified? Does it not contain national defense information?
19 As the Court is aware, we are dealing with over 300 records
20 here. That process has begun. That process needs to continue.

21 If the Court says only ODNI can look at this for
22 purposes of damage assessment, that is going to interfere with
23 the investigation, and that's something the Court, I think, has
24 to enjoin us from doing. And if it is going to enjoin us from
25 doing it, it is has to go through the Rule 65 factors.

1 I don't think the Government in any of the cases
2 where a special master has been appointed for attorney-client
3 purposes has ever said, okay, we still want to look at the
4 stuff. I think the Government has always agreed that it would
5 step aside during that review by the special master. We don't
6 find ourselves in that position with respect to the classified
7 and other Presidential records.

8 So I think the Court, if it is going to tell us, you
9 cannot use these for any other purpose, would have to enjoin
10 us.

11 To return briefly to the Court's question about
12 irreparable injury, first -- and I should have said this at the
13 outset, I think for purposes of this proceeding, the Court has
14 to accept that it was a valid warrant, that this was a lawful
15 search. So, again, the interests that a party could seek to
16 vindicate through a suppression motion are not at play here.

17 This was a lawful search. This was not, as the
18 magistrate judge found in finding probable cause for violations
19 of three criminal statutes, this was not an end run around the
20 Presidential Records Act. This is a valid search warrant for
21 evidence of three significant federal crimes.

22 The fact that the investigation is going to continue,
23 that is not the type of irreparable injury that courts have
24 recognized as supporting either an injunction or the exercise
25 of equitable jurisdiction for purposes of Rule 41

1 pre-indictment. And if that's what they are saying is their
2 irreparable harm, there is no case that supports it. They cite
3 none. I'm not aware of one, and I don't think the Court can
4 find it.

5 Last, I'm sort of reluctant to get into a
6 back-and-forth, but since they do reference their conversations
7 with me in their briefs, I would say that on the morning after
8 the search, so 13 days before the filing of the motion, we
9 declined their request for a special master. There has been no
10 subsequent re-upping of that request to us.

11 Also, on day one of the search, they knew the
12 identity of at least one of the filter attorneys and would have
13 been able to be in contact with that filter attorney. Also, on
14 day two, they were told that the filter review had begun and it
15 would take about two weeks, give or take, to get it done.
16 Again, my understanding is the filter team was prepared to
17 reach out to counsel, but for this intervening hearing and
18 motion and have instead gave its position to the Court in the
19 notice which they now have.

20 THE COURT: But just so I understand, upon
21 discovering that there were potentially privileged materials in
22 the seized property, there was no communication to Plaintiff's
23 counsel of the presence of such potentially privileged
24 materials; is that correct?

25 MR. BRATT: Correct. They were told -- and again,

1 since I'm not part of it, I also didn't know what the status
2 was. But they were told that the review for potentially
3 documents that had been segregated as potentially privileged,
4 the review by the filter team, by the filter attorneys had
5 begun. They were aware of that.

6 THE COURT: Let me ask also, there has been some
7 discussion in the filings related to leaks or disseminations of
8 information to the media. Are you aware, Mr. Bratt, of any
9 such dissemination to the media, relative to the contents of
10 the seized records?

11 MR. BRATT: Not on the part of anybody that I'm
12 working with. Obviously, you know, things -- I see the same
13 things in the press that other people do. It's bad. People
14 are talking. If people on the Government's side are talking
15 about it, I'm not aware of anybody that we work with that has
16 had contact with the press and certainly don't condone it in
17 any way.

18 THE COURT: All right.

19 I guess one final question I have. I know there has
20 been some discussion about the typical special master scenario
21 involving an attorney's office. Is there any authority that
22 would cabin the appointment of a special master only in the
23 more formal or traditional attorney context? In other words, I
24 haven't seen such a sort of carve-out in the special master
25 law, even if ordinarily that's how they arise.

1 MR. BRATT: So in the context of searches, I'm only
2 aware -- and Ms. Edelstein, I know, has dived into -- deeper
3 into the case law than I have. I'm only aware of a special
4 master being appointed in however many cases there are to
5 filter for attorney-client. I'm not aware of any other sort of
6 privilege issues ever being referred to a special master.

7 THE COURT: I believe in one case, the Government
8 initiated the request and, in that request, did refer to the
9 appointment of a special master for purposes of executive
10 privilege.

11 MR. BRATT: So that's the Giuliani matter, and we
12 inquired of our colleagues in the Southern District of New
13 York, and they told us and they confirmed it with the special
14 master that there was no review for executive privilege in that
15 case. The only review that occurred was for attorney-client.

16 THE COURT: But there was no objection to
17 conceptually the special master engaging in that work as well.

18 MR. BRATT: So again, I wasn't part of, you know,
19 what was -- I know there was a letter from that office to the
20 court. I don't know how that came up or why somebody
21 envisioned that. It certainly -- and again, that was a private
22 attorney for the former President. Certainly the volume, to
23 the extent -- and somebody outside of government, so to the
24 extent that there even would have been potentially executive
25 privilege documents in those materials is a little hard to

1 conceive, but maybe somebody, you know, had a concern about
2 that.

3 This is entirely different. This is -- these are,
4 you know, scores of executive branch or documents that are
5 potentially subject to executive privilege.

6 THE COURT: All right, thank you.

7 I did have some questions for the filter review team
8 attorneys, so Mr. Lacosta or Mr. Hawk.

9 MR. HAWK: Yes, Your Honor; Benjamin Hawk on behalf
10 of the United States.

11 THE COURT: Good afternoon.

12 MR. HAWK: Good afternoon.

13 THE COURT: I was curious if you could offer any
14 observations about the safeguards that have been taken in the
15 course of conducting the privilege review team.

16 My review of the records indicates that there might
17 have been at least some inadvertent transmission of materials
18 without, of course, revealing any sensitive information. So
19 with that in mind and given Plaintiff's suggestion that there
20 may have been also some missteps initially in the execution of
21 the warrant in terms of not doing a full privilege review of
22 the entire premises, I wonder what the Government's position
23 was on that score.

24 MR. HAWK: Yes, Your Honor. I'm happy to address
25 those questions.

1 One point, in terms of clarification, we set forth
2 the process that we followed in some of the matters that Your
3 Honor is referencing in our notice which remains under seal
4 with permission of counsel concurrence. I would propose I have
5 permission to be able to speak about the content of that
6 notice. It doesn't touch on any items that could potentially
7 be privileged.

8 I would further suggest, Your Honor, at a point in
9 time Your Honor would deem appropriate, we would unseal that
10 notice, perhaps with redactions to the extent the parties can't
11 come to any agreement with any materials that might be
12 potentially privileged.

13 THE COURT: And I appreciate the concern.

14 Mr. Kise or Mr. Trusty, any objection to general
15 discussion of the procedures without preference to any
16 privileged items.

17 MR. KISE: No, Your Honor. As stated, our concerns
18 really relate to waiver of the substantive privileges.
19 Anything that doesn't touch on that, we are satisfied with.

20 THE COURT: You may proceed.

21 MR. HAWK: Thank you, Your Honor.

22 So as explained in our notice, the Government took
23 the attorney-client privilege -- the possibility of
24 attorney-client privilege issues very seriously, beginning with
25 setting forth protocol that the filter team and case team would

1 follow in the search warrant affidavit which is now unsealed
2 and available to the public. In addition, the filter team and
3 case team had conversations with the filter agents to give them
4 direction.

5 I want to make clear that the filter team agents
6 applied a very broad and expansive criteria and standard to
7 attorney-client privilege being any document that they saw that
8 appeared to be legal in nature were contained in the attorney
9 name -- or readily identifiable attorney name, they immediately
10 segregated and identified as potentially privileged.

11 To take a step back in terms of the actual execution
12 of the search, Your Honor, the search warrant protocol, the
13 filter protocol set forth in the affidavit does address what we
14 call the "45 Office that I understand to be the office of the
15 former President. However, the case team did elect at the time
16 of the search to apply the same filter protocols to the actual
17 storage room, the other location where evidence and items were
18 seized, and so the same filter process was applied to both
19 locations, which I think is important. So the filter team
20 agents did an initial review and search of those areas before
21 the case team agents did.

22 And upon finding items that appear, again applying an
23 extremely expansive view of the attorney-client privilege to be
24 over inclusive and err on the side of caution given the
25 circumstances of the search, when they identified something

1 that was legal in nature or contained a name of readily
2 identifiable attorney, they then -- that, for example, was in a
3 box commingled with evidence responsive to attachment B, they
4 sealed that box, they marked it as potentially privileged, and
5 the filter agents maintained custody and control and segregated
6 that from the case team from the moment that evidence was
7 identified to the point where it was transferred to the
8 Washington field office. Those items, Your Honor, pursuant to
9 the protocol, again were identified as being potentially
10 privileged applying that broad standard, that was the first
11 step of the filter process.

12 The second step of the filter process, which is also
13 set forth in the affidavit, was for the filter attorneys to
14 then take a look and apply a legal analysis to the items and
15 the documents that the filter agents had identified as
16 potentially had privileged. Mr. Lacosta and I did that. There
17 is not a high volume of materials, as Your Honor is aware and
18 made reference to. It is approximately 520 pages, and 64 what
19 we call "sets of materials" that could be one document or two
20 copies of the same document or several documents that perhaps
21 are related in nature.

22 Mr. Lacosta and I took the time methodically to go
23 through those items to assess what we had and what the
24 potential issues could be. And I want to pause here for a
25 moment, Your Honor, and address some comments that Mr. Trusty

1 had made about the filter team and our communication.

2 So as Mr. Bratt pointed out, I was identified as the
3 primary point of contact for the filter team at the outset of
4 the search warrant and the execution of it. I would have
5 assumed that counsel, had they had any questions or issues or
6 concern, knew how to contact me and would have done so. I did
7 not reach out nor did Mr. Lacosta because we wanted to be in a
8 position to understand what we had.

9 We are only a few weeks out of the search warrant,
10 Your Honor, and we wanted to be able to assess, determine what
11 were the potential issues, and actually be in a position to
12 have meaningful conversations with counsel so we could address
13 questions to the extent we could answer them. That all
14 coincided with the motion that Plaintiff filed in this case.
15 Respectfully, Your Honor, we were prepared to communicate and
16 reach out to counsel and to actually provide them with a copy
17 of all of those items that I referenced for them to review and
18 assert privilege so we could move through the steps set forth
19 in the protocol and the warrant. Given Your Honor's
20 preliminary opinion to appoint a special master to this matter,
21 we wanted to be respectful of the Court and we wanted to allow
22 the Court time to consider the issues before the Court and also
23 rule on them, so we put a pause on that process. Generally
24 speaking, as the Court is aware and counsel now knows, in our
25 notes we filed, we set forth a proposal in terms how to proceed

Thursday, September 1, 2022.

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1 and continue.

2 So going back to the filter process, Your Honor, when
3 Mr. -- there were two instances that Your Honor noted. I can't
4 get into specifics. I think my view I can offer at this point
5 is, I think to the extent we call them "inadvertent exposure,"
6 I would use that terminology and view it in terms of exercising
7 an abundance of caution until we have actually made a
8 determination and consultation with counsel as to whether those
9 items are actually privileged in nature because, again, the
10 Government applied an expansive criteria to attorney-client
11 privilege.

12 Those two instances I would also reference, Your
13 Honor, are examples of the filter process actually working
14 where the case team -- and this is actually set forth again in
15 the protocol in the warrant, where the case team identified
16 something that they determined warranted further review. And
17 again, without getting into specifics, I can offer in this
18 setting one example is seeing the top of the letterhead with a
19 firm name. Case team ceased reviewing that item in that box;
20 and as they should appropriately, turned it over to the filter
21 review team and Mr. Lacosta and I to conduct a further review
22 analysis.

23 In the second instance, Your Honor, again, I think
24 this is being personally over inclusive in an abundance of
25 caution recognizing the circumstances that we find ourselves

1 in, the second instance was again an item generally speaking --
2 Your Honor, if you can give me a moment just to think on how to
3 frame this.

4 The second instance was an item where a case team
5 attorney saw that there might be -- saw that there might be --
6 saw that there were -- bottom line is, Your Honor, I do not
7 believe this information is privileged, but I still want to be
8 respectful, and I want respect the process and Counsel's
9 opportunity to assert, but it was an instance where, I believe
10 in my view, the case team attorney was exercising extreme
11 caution in identifying a document that could potentially
12 include privileged information and so, exercising that caution,
13 gave it to the case team -- or gave it to privilege review team
14 to review, and that Your Honor, as counsel --

15 THE COURT: And that currently remains in the
16 potentially privileged pile, so to speak?

17 MR. HAWK: Yes, Your Honor.

18 Everything, Your Honor, in terms of any -- again, we
19 are using the term "potentially privileged," but that is what
20 is in that category of information, it is our view the vast
21 majority of it is not privileged. But again, we are respecting
22 the process and the protocol set forth.

23 THE COURT: So of the 540 documents that have
24 tentatively been deemed potentially privileged and in the
25 Government's expansive view of that term, did any of those

1 documents originate from somewhere other than the storage room
2 or the 45 Office?

3 MR. HAWK: Your Honor, one minor clarification;
4 respectfully, it is 520 pages.

5 THE COURT: Oh, I'm sorry, 520 pages. Thank you.

6 MR. HAWK: We categorize it as 64 sets of materials.

7 Not to my knowledge, no, Your Honor. The evidence
8 that was provided to us to review, my understanding came from
9 the storage room and the 45 Office and nowhere else.

10 If I may also briefly, Your Honor, just for the
11 record and sake of clarity, when I say "maintain custody and
12 control," I mean maintain custody and control. When something
13 is given to the privilege review team, the FBI has a separate
14 room that is locked that only the privilege review team has
15 access to via their badge that nobody else has access to. And
16 we take it very seriously, even though we don't think the
17 majority of it is privileged; but to be respectful of the
18 process which, again, we would have engaged counsel but for the
19 current issue before the Court.

20 THE COURT: Thank you very much, Mr. Hawk.

21 MR. HAWK: Your Honor, if I may.

22 THE COURT: Yes.

23 MR. HAWK: We would like to seek permission to
24 provide copies -- the proposal that we offered, Your Honor,
25 provide copies to counsel of the 64 sets of the materials that

1 are Bates stamped so they have the opportunity to start
2 reviewing.

3 THE COURT: I'm sorry, say that again, please.

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

18 THE COURT: All right. I'm going to reserve ruling
19 on that request. I prefer to consider it holistically in the
20 assessment of whether a special master is indeed appropriate
21 for those privileged reviews. I think Mr. Bratt is hoping to
22 get a few more minutes in.

23 So, Mr. Bratt, I'll hear from you and then give
24 Plaintiff's counsel an opportunity up to present any additional
25 argument.

1 MR. BRATT: Thank you, Your Honor. I apologize, if I
2 was looking overly anxious to speak.

3 My colleagues reminded me of something in response to
4 your question about the Giuliani proposal and how this case is
5 so much different from even any conceivable case that would
6 also have involved Presidential records, and that is because we
7 have over 300 classified documents here. The proposal would be
8 not only to have somebody outside of the Executive Branch
9 review for executive privilege, but also to turn over to that
10 person classified documents to get that person the necessary
11 clearances of which there are many and then --

12 THE COURT: I just want to be clear. The inventory,
13 I saw the references, it is marked as "classified."

14 MR. BRATT: Fine. Not to presuppose the review, yes,
15 documents bearing -- maybe a better way to put it, documents
16 bearing classification markings. There are over 300 of those.
17 We treat them presumptively as classified. We would not turn
18 them over to somebody that does not have the appropriate
19 clearances.

20 Also under the protocols that are proposed by the
21 Plaintiff, they would regain access to those including
22 potentially the former President. We have no idea where they
23 would be stored; and again, this would be giving access to
24 people things that they do not have the right to have access,
25 at this point in time, all for, you know, what we think is a

1 fanciful view that somehow they would be successfully able to
2 interpose an executive privilege objection that would prohibit
3 the Executive Branch from reviewing the Executive Branch
4 materials for a core Executive Branch function.

5 Thank you.

6 THE COURT: Thank you. All right.

7 Final thoughts from Plaintiff's counsel, then we will
8 recess.

9 MR. TRUSTY: Your Honor, I'll be very brief.

10 Just in terms of the things we just heard from
11 Government counsel, again, without getting specific, we are now
12 hearing with the unveiling or the kind of not literal but
13 beginning of unveiling of a self-assessment by the filter team
14 of how they conducted themselves, that the wall broke and you
15 are being told, "Trust us, it is no big deal, we were really
16 being conservative." Maybe that's exactly how it plays out,
17 but this is the wrong case to keep getting these late
18 assurances from the filter team that, you know, there is
19 nothing to worry about.

20 The record should probably reflect, if it doesn't
21 already, that I believe Mr. Hawk is a deputy within Mr. Bratt's
22 section at DOJ. And it is interesting to me -- again, not to
23 put too fine a point on it, but when there is a filter
24 situation, whether it is a capital case, whether it is a
25 privilege review, whatever it may be that calls out for

1 sequestration of the litigation, it's very easy, particularly
2 in this case called "Washington D.C.," to tap someone who is
3 truly disconnected not only from the criminal investigation but
4 from the supervisory chain. And what the National Security
5 Division did was they picked the deputy within the section that
6 is doing the criminal investigation. They could have turned to
7 any section of DOJ or to a U.S. Attorney's Office; they didn't
8 do that.

9 Again, I'm not trying to overstate concerns here, but
10 I'm also not willing to ignore concerns. This is a situation
11 where -- of the Government's own doing where this -- again, the
12 modest amount of supervision that we are suggesting makes
13 sense.

14 As to the latest bogeyman, the latest obstacle kind
15 of thrown before the Court in terms of this potential process,
16 that clearance is really complicated and takes a lot. Well,
17 first of all, I have TS clearance right now which I think would
18 carry through; but if there is a special master that doesn't
19 have clearance, it can be expedited by JMD at the Department of
20 Justice. This is not something that is going to take -- it
21 doesn't have to take weeks or months. It can be done very
22 quickly, particularly with a gentle prod from this Court. So,
23 you know, these are -- it's almost like chasing somebody who
24 keeps throwing trash cans behind them to try to stop you from
25 catching up, and that's what we are seeing this afternoon.

1 The last thing I would just say is the deprivation of
2 access to these records that is continuing, to this point, is
3 actually a violation of 2205. It is a violation of the
4 Presidential Records Act because President Trump has unfettered
5 access to Presidential and personal records.

6 Look, all we are saying is get another set of eyes on
7 it so we can have some assurance that the process is fair in
8 this extraordinary case.

9 And we appreciate Your Honor's obviously very active
10 interest in this matter in terms of your questions today and
11 the expeditious nature of the hearing. And if there is no
12 other questions, I'll sit down.

13 THE COURT: All right, thank you.

14 I have nothing further.

15 But if the Government's wishes couple minutes to
16 respond, I'm happy to hear any final observations, and then I
17 will be recessing this hearing.

18 The Court will not be entering any order orally, but
19 will be entering a written order in due course.

20 Mr. Bratt.

21 MR. BRATT: Just briefly, Your Honor.

22 With respect to Mr. Hawk, while in the ordinary
23 course, he is my deputy for expert control and sanctions. We
24 felt collectively it was important to have a person on the
25 filter side with a strong national security background; but for

1 purposes of this matter, he does not report to me. He reports
2 elsewhere.

3 THE COURT: Thank you.

4 All right. I appreciate the parties' assistance. I
5 appreciate the members of the gallery maintaining decorum.

6 The Court is in recess.

7 THE COURTROOM DEPUTY: All rise.

8 (PROCEEDINGS ADJOURNED AT 2:40 p.m.)

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C-E-R-T-I-F-I-C-A-T-E

I hereby certify that the foregoing is
an accurate transcription and proceedings in the
above-entitled matter.

9/2/2022
DATE

/s/DIANE MILLER
DIANE MILLER, RMR, CRR, CRC
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<p>MR. BENJAMIN: [1] 6/1</p> <p>MR. BRATT: [21] 2/16 3/24 4/4 4/18 5/12 7/23 18/9 20/9 21/8 38/20 39/12 39/19 39/24 42/25 43/11 44/1 44/11 44/18 54/1 54/14 57/21</p> <p>MR. CORCORAN: [1] 2/11</p> <p>MR. GONZALEZ: [1] 2/18</p> <p>MR. HAWK: [10] 45/9 45/12 45/24 46/21 51/17 52/3 52/6 52/21 52/23 53/4</p> <p>MR. KISE: [10] 2/6 4/8 4/24 5/1 6/22 6/25 7/21 8/1 17/22 46/17</p> <p>MR. LACOSTA: [1] 6/7</p> <p>MR. TRUSTY: [13] 2/9 9/24 15/19 16/16 17/4 17/21 30/17 31/11 33/21 35/18 36/24 37/19 55/9</p> <p>MS. EDELSTEIN: [10] 2/20 23/1 23/19 23/24 24/12 26/15 27/20 27/25 29/6 29/11</p> <p>MS. HALLIGAN: [1] 2/13</p> <p>THE COURT: [63]</p> <p>THE COURTROOM DEPUTY: [3] 2/2 6/16 58/7</p> <p>/</p> <p>/s/DIANE [1] 59/5</p>	<p>10th [3] 26/17 26/23 28/15</p> <p>12 [1] 36/7</p> <p>12-year [1] 32/13</p> <p>13 [1] 42/8</p> <p>14 [2] 35/13 36/7</p> <p>15-minute [1] 6/13</p> <p>1:11 [1] 6/17</p> <p>1:26 [1] 6/18</p> <p>2</p> <p>2022 [2] 1/5 59/5</p> <p>22-81294-CIV-CA NNON [1] 1/2</p> <p>22-CV-81294 [1] 2/3</p> <p>2202 [1] 24/22</p> <p>2203 [1] 24/24</p> <p>2204 [1] 18/1</p> <p>2205 [1] 57/3</p> <p>2337 [1] 59/8</p> <p>2:40 [1] 58/8</p> <p>3</p> <p>30-something [1] 12/14</p> <p>300 [3] 40/19 54/7 54/16</p> <p>34950 [1] 59/8</p> <p>39 [2] 4/22 5/3</p> <p>4</p> <p>41 [18] 11/24 19/3 19/3 19/9 19/10 19/11 19/12 19/15 19/23 20/17 20/23 21/3 30/22 34/1 34/10 35/9 35/9 41/25</p> <p>44 [1] 18/1</p> <p>45 [3] 47/14 52/2 52/9</p> <p>45th [4] 8/24 9/5 9/13 19/18</p> <p>5</p> <p>520 [3] 48/18 52/4 52/5</p> <p>540 [1] 51/23</p> <p>6</p> <p>64 [4] 48/18 52/6 52/25 53/5</p>	<p>65 [7] 36/16 36/22 38/21 39/2 39/6 39/11 40/25</p> <p>7</p> <p>70 [1] 1/6</p> <p>77.1 [1] 3/4</p> <p>772-467-2337 [1] 59/8</p> <p>8</p> <p>81294 [1] 2/3</p> <p>9</p> <p>9/2/2022 [1] 59/5</p> <p>A</p> <p>above [1] 59/4</p> <p>above-entitled [1] 59/4</p> <p>absolutely [3] 11/5 17/4 24/8</p> <p>abundance [3] 7/4 50/7 50/24</p> <p>accept [3] 33/15 33/16 41/14</p> <p>access [14] 17/9 18/1 31/18 31/25 32/11 37/6 38/23 52/15 52/15 54/21 54/23 54/24 57/2 57/5</p> <p>accessing [1] 32/19</p> <p>accompanying [1] 5/7</p> <p>accomplish [1] 25/14</p> <p>accordance [1] 29/17</p> <p>accusatory [1] 8/11</p> <p>acknowledge [1] 32/7</p> <p>act [12] 15/9 16/7 17/15 32/8 32/9 32/9 32/12 33/2 34/14 40/12 41/20 57/4</p> <p>action [3] 3/10 21/5 21/7</p> <p>actions [2] 25/24 33/1</p> <p>addition [5] 22/8</p>	<p>26/12 28/11 40/10 47/2</p> <p>address [9] 16/3 16/3 22/24 23/2 36/12 45/24 47/13 48/25 49/12</p> <p>adequate [2] 22/9 22/10</p> <p>adhere [1] 7/14</p> <p>ADJOURNED [1] 58/8</p> <p>administration [3] 8/7 8/18 18/11</p> <p>administrative [1] 3/9</p> <p>admit [1] 12/15</p> <p>admittedly [1] 31/7</p> <p>affidavit [9] 13/1 13/3 30/23 34/15 35/7 36/5 47/1 47/13 48/13</p> <p>afternoon [17] 2/7 2/9 2/13 2/15 2/16 2/18 2/20 2/22 2/24 5/21 5/23 6/3 9/24 23/1 45/11 45/12 56/25</p> <p>agents [8] 11/25 34/24 47/3 47/5 47/20 47/21 48/5 48/15</p> <p>aggrieved [1] 18/16</p> <p>agreement [1] 46/11</p> <p>agreements [2] 53/14 53/14</p> <p>AILEEN [1] 1/10</p> <p>aisle [2] 13/21 30/21</p> <p>alarm [1] 17/12</p> <p>alienate [1] 35/19</p> <p>allegation [1] 10/22</p> <p>allegations [2] 24/20 31/25</p> <p>allow [6] 11/1 12/21 15/22 37/7 38/12 49/21</p> <p>allowed [3] 10/1 29/19 53/12</p> <p>allows [3] 11/11</p>	<p>34/19 36/9</p> <p>almost [1] 56/23</p> <p>alone [4] 4/7 10/11 11/3 11/22</p> <p>amazing [2] 11/12 12/18</p> <p>Amendment [9] 11/5 11/12 15/3 20/2 20/5 20/25 21/1 34/5 39/15</p> <p>AMERICA [2] 1/6 2/3</p> <p>American [1] 9/19</p> <p>amount [1] 56/12</p> <p>analysis [5] 19/21 36/16 48/14 50/22 53/10</p> <p>announce [1] 12/16</p> <p>announces [1] 14/8</p> <p>announcing [1] 12/7</p> <p>anomalous [1] 19/4</p> <p>answer [2] 17/24 49/13</p> <p>anticipate [1] 31/16</p> <p>anticipates [2] 32/10 32/12</p> <p>antiquated [1] 37/9</p> <p>anxious [1] 54/2</p> <p>anymore [1] 25/4</p> <p>apologize [1] 54/1</p> <p>appearances [2] 1/12 2/4</p> <p>applicable [1] 24/19</p> <p>applied [3] 47/6 47/18 50/10</p> <p>applies [6] 18/2 19/12 28/1 32/8 32/9 34/8</p> <p>apply [4] 25/16 34/8 47/16 48/14</p> <p>applying [2] 47/22 48/10</p> <p>appoint [4] 1/9 10/23 36/14 49/20</p> <p>appointed [4]</p>
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