

DISMISSAL OF THE MAR-A-LAGO CLASSIFIED DOCUMENTS CASE – SUPPORTED BY NEITHER HISTORY NOR PRECEDENT

- Documents case dismissed on Monday on the ground that the appointment of Jack Smith as special counsel was unconstitutional. Judge Cannon focused on the fact that Smith was not in government at the time of appointment.
- Eight courts have ruled on appointments of special counsel and no court has ruled that the appointment was unconstitutional or otherwise improper.
- The seminal case is the Nixon Oval Office tapes case. Nixon did not challenge the appointment of an independent counsel and, therefore, the Supreme Court did not directly address the appointment. It did however uphold the independent counsel's subpoena of the tapes. Subsequent cases, until today, have read the tapes case as settled law.
- The court in the Iran-contra case specifically rejected a challenge to the appointment of an independent counsel.
- Similarly, a court specifically upheld the appointment of Robert Mueller as a special counsel.
- Each of the independent/special counsel in these three cases were outside government when appointed.

By many measures, American democracy survived the January 6th insurrection and the underlying efforts to prevent the peaceful transfer of power, or so we thought. It often was said that the institutions of our democracy held – the Trump campaign lost every case that was brought challenging the results of the election, and President Biden took the oath of office on January 20, 2021.

Yes, Donald Trump survived (his second) impeachment for inciting the insurrection, but the nation bore witness to the testimony of Republican officials presented as part of the televised hearings of The United States House Select Committee to Investigate the January 6th Attack on the United States Capitol. And the nation would then (in theory) bear witness to potentially more damning testimony against Trump that would be presented in court in Washington D.C., building on the work of the Select Committee, as well as in courts in Atlanta, Georgia and Fort Pierce, Florida.

So, yes, the institutions did hold. But what many did not fully appreciate is that behind the great institutions of our democracy are individuals. And in this critical respect, some key individuals have failed to uphold the ideals and the principles of our democracy. Consequently, 15 weeks out from the election, American voters have yet to hear evidence and juries' verdicts regarding Trump's actions to overturn the election and the obstruction of justice in the classified documents case.

We saw that failure in the decision of the Supreme Court over the disqualification provision of Section 3 of the 14th Amendment. We saw that failure in the decision of two Supreme Court Justices to decline to recuse themselves in cases involving the insurrection and a further diminution of the reputation of the highest court in the land. We saw that failure in the Supreme Court's majority opinion issued July 1 on Trump's immunity from criminal prosecution in respect of his efforts to overturn the election (*Trump v. United States*) (*see* my



earlier briefing note on the immunity decision). And on Monday, we saw that failure in the decision of Judge Aileen Cannon to dismiss the classified documents case against Trump on the ground that the appointment of Special Counsel Jack Smith violated the Appointments Clause of the Constitution.

Judge Cannon Goes Rogue

The classified documents case was supposed to be the most straight-forward of the various criminal prosecutions brought against Trump. Trump, claiming he had declassified all the classified documents that ended up in his possession after he left the White House and that those classified documents constituted personal records, appeared to have few effective defenses to the criminal charges. When Trump announced he was running again, Attorney General Merrick Garland appointed Jack Smith as Special Counsel to insulate the Department of Justice against claims of conducting a political vendetta. Ironically, this appointment (in lieu of using a career DOJ prosecutor) appears to have handed Trump another opportunity to delay, if not escape altogether, prosecution.

Appointments of special counsel (formerly known as special prosecutors or independent counsel) have a long history in the United States. For example, both Presidents Ulysses S. Grant (to investigate the Whiskey Ring scandal) and Theodore Roosevelt (to investigate bribery in the Post Office Department and an Oregon land fraud scandal) appointed special prosecutors. All told, eight judges have rejected the notion that Attorneys General lack the authority to name these prosecutors.

Notwithstanding that "the forms and practices of these appointments have varied," as Adam Klasfeld noted in Just Security ("Judge Cannon Finds Special Counsel Unconstitutional in Trump Classified Documents Case: What's Next for Jack Smith?"), Judge Cannon's decision represents the first instance ever of a court finding that the appointment of a special counsel is unconstitutional. Moreover, it flies in the face of express precedent upholding these appointments.

Judge Cannon's inspiration for her position appears to be Justice Clarence Thomas' solo concurring opinion in the Trump immunity case, in which he suggested that the appointment of Special Counsel Smith was unconstitutional. Judge Cannon's decision prompted a spokesman for Smith to state, "The dismissal of the case deviates from the uniform conclusion of all previous courts to have considered the issue that the Attorney General is statutorily authorized to appoint a Special Counsel."

Key to her decision was the fact that at the time of his appointment, Smith was not in government. This would fly in the face of case law upholding, expressly or by implication, the appointments of Leon Jaworski in the Watergate case, Lawrence E. Walsh in the Iran-contra case and Robert S. Mueller III in the inquiry into the Trump campaign's ties to Russia – all appointed from outside of government. In effect, Judge Cannon rejected the longstanding view, based on a series of statutes, that Congress had granted attorneys general the power to appoint special counsel, regardless of whether or not the special counsels in question came from within government. One such statute (28 U.S. Code § 533) provides that "The Attorney General may appoint officials … to detect and prosecute crimes against the



United States … [and] to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General."

Lawrence H. Tribe and Dennis Aftergut, in their Guardian opinion piece ("Aileen Cannon has taken the sledgehammer to the rule of law") describe the Cannon decision as "dropping a sledgehammer on the rule of law, by "smashing the longstanding and vital authority of special counsels." In the process, she "has made a mockery of justice under the law." First, she slow-rolled the process for over a year and then, as the RNC Convention kicked off, she "toppled the whole case by shredding the long-established structure through which successive attorneys general have appointed special counsel to investigate and prosecute crimes against the nation too sensitive for the justice department to handle in the ordinary course."

To reach her decision, Judge Cannon had to ignore the central holding of *United States v. Nixon*, wrongly characterizing it as mere dictum. In that seminal 1974 Watergate case, the Supreme Court upheld the subpoena issued by Leon Jaworski seeking President Richard M. Nixon's Oval Office tapes. At the time of his appointment, Jaworski was in private practice. Chief Justice Warren Berger wrote that Congress had vested in the Attorney General both the "power to conduct the criminal litigation of the United States government" and "the power to appoint subordinate officers to assist him in the discharge of his duties." Acting Attorney General Bork, he added, "acting pursuant to those statutes [referred to above]," had delegated prosecutorial authority to Jaworski, including the power to contest the assertion of executive privilege over the Oval Office tapes.

While the Supreme Court in the Oval Office tapes case did not rule on any challenge to Jaworski's appointment, since Nixon had not challenged *the appointment*, the Court did rule on, and upheld, Jaworski's *authority* to issue the subpoena. The failure of the Court to rule directly on the authority to appoint special counsel regularly has been raised since and has served as a basis to challenge appointments (including all those cited above), but no court has found an appointment to be unconstitutional, until now.

Judge Cannon likewise had to ignore the fact that, in 1987, the US Court of Appeals for the District of Columbia had rejected a challenge to the authority of the independent counsel in the Iran-contra case. Lawrence Walsh too had been in private practice at the time of his appointment. (In 1978, Congress had passed a law establishing the position of "independent counsel." That law lapsed in 1999, whereupon a Department of Justice regulation called for appointments of "special counsel.") Writing for the majority and citing cases dating back to 1954 and statutes, Judge Douglas H. Ginsburg wrote that the Appeals Court had "no difficulty concluding that the attorney general possessed the statutory authority to create the Office of Independent Counsel."

Judge Cannon also had to ignore the 2019 rejection by the US Court of Appeals for the District of Columbia of the challenge to the appointment of Special Counsel Mueller by Trump's former campaign manager, Paul Manafort, Roger Stone's associate, Andrew Miller, and Concord Management, the Russian company allegedly responsible for election interference in 2016. In the 2019 ruling, the court accepted the language in *United States v. Nixon* as settled precedent. Plaintiffs had argued, as Trump did in the classified documents



case, that that language had been merely dictum. The court in 2019 expressly rejected that conclusion in finding that "[t]he Supreme Court's quoted statement regarding the attorney general's power to appoint subordinate officers is, therefore, not dictum." Cannon rejected this in her decision, reaching the very conclusion the Appeals Court had rejected in 2019.

Most recently, Hunter Biden's effort to challenge the appointment of a special counsel failed.

Judge Cannon was selected at random after prosecutors determined that Florida was the most appropriate venue to hear the classified documents case, because the documents were secreted in Mar-a-Lago. As David A. Graham noted in his piece in the Atlantic ("Aileen Cannon is who critics feared she was"), her selection immediately set off alarms. She was a Trump appointee and had little trial experience. Her ruling in favor of Trump before charges were filed (calling for a special master to vet evidence) was subsequently reversed in December 2022 in a harsh slap down by the 11th Circuit. "The law is clear," they wrote. "We cannot write a rule that allows any subject of a search warrant to block government investigations after the execution of the warrant. Nor can we write a rule that allows only former presidents to do so."

While criticism of Judge Cannon may have been unfair and premature, the slow-rolling of the case and ultimate dismissal seem to have confirmed the worst fears about her. Charlie Savage and Alan Feuer reported last month in the New York Times ("Judge in Trump Documents Case Rejected Suggestions to Step Aside") that two federal judges in Florida's Southern District (including the Chief Judge) had attempted to persuade their colleague Judge Cannon to step aside in favor of another judge. She rejected both entreaties.

As Paul Rosenzweig aptly noted ("Judge Cannon Has Gotten It Completely Wrong"), Judge Cannon "in her hubris, disregards both history and precedent." Her conclusions regarding *United States v. Nixon*, he writes, are "wrong; the special prosecutor's authority to subpoena Nixon was at issue, and the authority was dependent on prosecutors' very existence." "But", he continues, "even if she were correct, it takes significant hubris to disregard the Supreme Court when you are a lower-court judge. It takes even more hubris to ignore (as Cannon did) definitive holdings from other courts (such as the D.C. Circuit's decision to uphold the appointment of Special Counsel Mueller) on the grounds that they misunderstood the law and made a mistake in not realizing that the Supreme Court had spoken only in dicta." As for the depth of that hubris, consider for a moment the makeup of the bench in 1974, as pointed out by Robert Hubbell (The education of Aileen Cannon): Warren Berger, William O. Douglas, William J. Brennan, Potter Stewart, Byron White, Thurgood Marshall, Harry Blackmun and Lewis F. Powell. Talk about legal giants!

Where to from Here?

This afternoon, prosecutors filed a notice of appeal to the 11th Circuit. As Joyce Vance notes in her excellent series (Civil Discourse), whichever party loses likely then heads to the Supreme Court. While the Supreme Court is not obligated to hear the appeal, its track record to date suggests it would. In any event, as she notes, the decision will rest with the Supreme Court, either because the Justices let the ruling stand or accept the case and rule on it. Vance recalls that the 11th Circuit acted expeditiously in late 2022 in rejecting Judge Cannon's



decision on the appointment of a special master to oversee evidence seized in the FBI search of Mar-a-Lago.

Vance then addresses a few other paths forward:

- Prosecutors refile the case in another district. Unlikely. That the case was not filed in the District of Columbia, for example, suggests that prosecutors were concerned that the case would have been thrown out due to improper venue. The basis for the case is not the theft *per se,* but rather the reckless mishandling of the classified documents after the fact and obstruction of justice, none of which occurred in Washington, D.C. Note too if the basis was the theft, the recent immunity decision might have accorded immunity to that act, as an official act.
- Bedminster, New Jersey. Also, unlikely.
- The US Attorney in Southern Florida seeks a new indictment to end-run around the Special Counsel dismissal. Unlikely to be effective under rules designed to avoid "judge shopping," meaning a refiled case would likely be assigned to Judge Cannon.
- The best outcome, she posits, is a quick appeal, reversal and reassignment on remand to a different judge.
- The appeal will be heard by a three-judge panel, sitting in Atlanta. Before any appeal gets to the Supreme Court, it would likely go to the full 11th Circuit (*en banc).* If Trump were to win in the 11th Circuit, there would then be a "split" in the Circuits (11th Circuit and the DC Circuit), calling out for the Supreme Court to resolve the split. Were the 11th Circuit to side with the prosecution (aligning with the DC Circuit), there would be less compulsion for the Supreme Court to grant *cert.* and hear the appeal. At this point, we are likely well past Election Day.
- Also, a less likely outcome she notes is that the 11th Circuit affirms the dismissal, leaving the Department of Justice to take over the case, reindict and move forward without a special counsel, and potentially order the case to be assigned to a different judge (on the ground that Judge Cannon refused to entertain any paths forward other than dismissal of the indictment, as suggested by prosecutors prior to the dismissal).
- In the meantime, while Judge Cannon conceded that her decision only impacts the case before her, expect Trump to file for an additional stay of the January 6th case, jurisdiction over which will be restored to District Court Judge Tanya Chutkan on August 2. Trump would likely argue that the D.C. case should be stayed pending the outcome of Smith's appeal to the 11th Circuit.

Stay tuned.

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