[ORAL ARGUMENT SCHEDULED OCTOBER 27, 2017]
Consolidated Nos. 17-5142, 17-5164

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES DEPARTMENT OF THE TREASURY,

Petitioner-Appellant,

v.

DENNIS BLACK; CHARLES CUNNINGHAM; KENNETH HOLLIS; DELPHI SALARIED RETIREES ASSOCIATION,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIR. R. 28(a)(1)

A. Parties and Amici

The United States Department of the Treasury was petitioner in the district court, and is appellant in this Court. Dennis Black, Charles Cunningham, Kenneth Hollis, and Delphi Salaried Retirees Association were respondents in the district court and are appellees in this Court. The Pension Benefit Guaranty Corporation was an interested party in the district court. There were no amici or intervenors in the district court, and there are no amici or intervenors in this Court.

B. Rulings Under Review

Treasury seeks review of the district court's order of April 13, 2017, Dkt. No. 44, available at 2017 WL 1373234, as modified by the district court's orders of June 7, 2017, Dkt No. 53, and July 12, 2017 (7/12/17 Min. Order). These orders are available at JA 10, JA 34, and JA 163.

C. Related Cases

These consolidated cases have not previously been before this Court. Counsel is not aware of any other related cases currently pending in this Court or in any other court within the meaning of Cir. R. 28(a)(1)(C).

s/ Abby C. Wright
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INTRODUCTION

This appeal arises from the enforcement of a civil subpoena against the Department of the Treasury. Respondents served the subpoena as part of their discovery efforts in their suit against the Pension Benefit Guaranty Corporation in the Eastern District of Michigan. Treasury, which is not a party to that underlying litigation, has produced over 70,000 pages of documents to respondents. At issue now are sixty-three documents over which the Office of the President has asserted the presidential communications privilege.

The district court correctly held that the documents fall within the presidential communications privilege. Nevertheless, in a blanket ruling, the court ordered Treasury to disclose all sixty-three documents to respondents—implicitly concluding that respondents' asserted need for the documents in their suit against the Pension Benefit Guaranty Corporation outweighed the significant constitutional interests protected by the presidential communications privilege. In reaching that erroneous conclusion, the court applied the wrong legal standard and did not conduct the inquiry required by the Court's precedent governing a party's attempt to overcome the presidential communications privilege. The order provides virtually no explanation for its ruling, failing to address how any group of documents, much less any particular document, provides evidence central to respondents' claims against the Pension Benefit Guaranty Corporation. Relying only on respondents' unsupported assertions of need, the order also fails to explain why any such evidence would be materially

different than evidence already obtained from the Pension Benefit Guaranty Corporation, Treasury, and other sources—including documents over which Treasury had claimed the deliberative process privilege. Any one of these errors warrants vacatur, and taken together they make clear that the district court's judgment should be reversed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court issued an opinion and order on April 13, 2017, which was modified by orders on June 7, 2017, and July 12, 2017. JA 163 (Dkt. No. 44); JA 10 (7/12/17 Min. Order); JA 34 (Dkt. No. 53). The government filed timely notices of appeal on June 12, 2017, and July 13, 2017. JA 32; JA 12. This Court has appellate jurisdiction over this consolidated appeal under 28 U.S.C. § 1291. *See* Order of Aug. 11, 2017, Nos. 17-5142, 17-5164 (D.C. Cir.).

STATEMENT OF THE ISSUE

Whether the district court erred in ordering the United States Department of the Treasury to produce sixty-three documents protected by the presidential communications privilege on the basis of respondents' general assertion of need and without conducting the inquiry mandated by this Court's precedents.

PERTINENT STATUTES AND REGULATIONS

The pertinent statute is reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. The Underlying Litigation

Respondents-appellees in this subpoena action are plaintiffs in an underlying civil suit brought in the United States District Court for the Eastern District of Michigan. Respondents are former employees of auto parts manufacturer Delphi Corporation and beneficiaries of the pension plain maintained by Delphi for its salaried workers. As relevant here, respondents sued the Pension Benefit Guaranty Corporation in September 2009, alleging that, in July 2009, the Pension Benefit Guaranty Corporation wrongly terminated their pension plan by agreement with the plan administrator. *See Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 200-01 (2d Cir. 1987) (approving summary termination of plan).[1]

The Pension Benefit Guaranty Corporation operates insurance programs for certain pension plans, including respondents' Delphi plan. *See Page v. Pension Benefit Guar. Corp.*, 968 F.2d 1310, 1311-12 (D.C. Cir. 1992). The purpose of these insurance programs is "to meet the problem of plans terminated without assets sufficient to cover vested benefits." *Id.* When a pension plan covered by the Pension Benefit Guaranty Corporation's insurance program is unable to pay all of its promised benefits, the Pension Benefit Guaranty Corporation typically becomes trustee of the

[1] Treasury and Treasury officials were initially named as defendants in respondents' suit, but the claims against them were dismissed. *See Black v. Pension Benefit Guar. Corp.*, No. 09-cv-13616, 2011 WL 3875055 at *4-9 (E.D. Mich. Sept. 2, 2011) (dismissing Count 5 of the Second Amended Complaint).

plan and provides participants with benefits up to statutory limits. *See* 29 U.S.C. §§ 1321-1322, 1361.

Respondents' suit alleges that the Pension Benefit Guaranty Corporation improperly entered into the agreement with Delphi to terminate respondents' pension plan and to assume responsibility for the plan as trustee, providing participants with benefits up to statutory limits. Among other things, respondents allege that the termination violated the Employee Retirement Income Security Act of 1974 (ERISA), which states that the Pension Benefit Guaranty Corporation "may institute proceedings" to involuntarily terminate an underfunded plan if certain conditions are met, 29 U.S.C. § 1342(a)(1)-(4), and then "may . . . apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund," *id.* § 1342(c)(1).

Specifically, respondents urge in the Michigan district court proceeding that the Pension Benefit Guaranty Corporation was not authorized to terminate the plan without obtaining a judicial decree. Their complaint asserts, among other things, that the Pension Benefit Guaranty Corporation and Delphi were "under strong pressure by the federal government" to agree to terminate the pension plan in order to "further the government's interest in restructuring the auto industry." Second Am. Compl. ¶ 27, Dkt. No. 145, *Black v. Pension Benefit Guar. Corp.*, No. 09-cv-13616 (E.D. Mich.).

Respondents have claimed that this allegation bears on the court's inquiry as to whether the Pension Benefit Guaranty Corporation was authorized to terminate respondents' plan. *See, e.g., id.* at ¶ 56.

As relevant here, in September 2011, the district court in the Eastern District of Michigan granted respondents' request for discovery concerning the question "whether termination of the Salaried Plan would have been appropriate in July 2009 if, as Plaintiffs contend, Defendants were required under 29 U.S.C. §1342(c) to file" a court proceeding to terminate the plan. Order, Dkt. No. 193, *Black v. Pension Benefit Guar. Corp.*, No. 09-cv-13616 (E.D. Mich.).

B. Third-Party Subpoenas

Pursuant to the then-applicable version of Federal Rule of Civil Procedure 45(a), respondents issued a subpoena of the United States District Court for the District of Columbia to Treasury seeking various documents and depositions.[2] The subpoena sought "[a]ll documents and things (including e-mails or other correspondence, spreadsheets, reports, analyses, snapshots, funding estimates, proposals or offers) received, produced or reviewed" by various individuals, and "related to: (1) Delphi; (2) the Delphi Pension Plans; or (3) the release and discharge by the Pension Benefit Guaranty Corporation of liens and claims relating to the

[2] Under the then-applicable rule, the subpoena had to be issued "from the court for the district where the production or inspection is to be made." Fed. R. Civ. P. 45(a)(2)(C) (2012).

Delphi Pension Plans." Dkt. No. 1, Exh. J, at 5-6. Respondents later issued a subpoena seeking to depose "one or more" Treasury officials concerning "[t]he Auto Task Force Officials' communications in 2009 relating to the GM-Delphi Relationship; the Delphi Pension Plans; and the release, waiver or discharge by the [Pension Benefit Guaranty Corporation] of liens and claims relating to the Delphi Pension Plans" and their communications with "the [Pension Benefit Guarantee Corporation], Delphi, GM, the Delphi DIP Lenders, Federal Mogul, Platinum Equity, the National Economic Council, and the Executive Office of the President" Dkt. No. 13-4, at 3.

1. Motions to Quash

From 2012 through 2014, the parties litigated whether the subpoenas should be quashed. The government urged, among other things, that the requested materials were cumulative and duplicative—particularly in light of the extensive discovery obtained by the respondents from the Pension Benefit Guaranty Corporation, depositions in a related proceeding, and testimony at seven congressional hearings where the termination of the Delphi plan was discussed. *See* Dkt. No. 15, at 11-13.

On June 19, 2014, the district court denied the government's renewed motion to quash. *See* JA 239 (Dkt. No. 27). With regard to relevance, the court deferred to the judge in the underlying Michigan case who had allowed discovery "designed to reveal whether the [Pension Benefit Guaranty Corporation] could have satisfied" the statutory standard for terminating the plan under 29 U.S.C. § 1342, had it sought a

judicial decree to do so, and whether the Pension Benefit Guaranty Corporation "yielded to pressure from other federal entities, including Treasury." JA 253-54 (Dkt. No. 27, at 15-26).

2. Motion to Compel

In 2014 and 2015, Treasury produced thousands of documents to respondents. Treasury withheld other documents, or produced them in redacted form, based on assertions of various privileges, including the presidential communications privilege.

In July 2015, respondents moved to compel production of the remaining documents over which Treasury claimed privilege. Dkt. No. 30, at 2. In response, the government formally asserted the presidential communications privilege on behalf of the Office of the President with regard to sixty-three documents. JA 195-98 (Declaration of Deputy White House Counsel, Dkt. No. 35-3). Respondents urged that the presidential communications privilege was overcome by their need for the requested materials, Dkt. No. 30, at 4, citing their allegation that their pension plan "did not need to be terminated, and that the Treasury or the White House impermissibly pressured the [Pension Benefit Guaranty Corporation] to terminate the Salaried Plan for unlawful, impermissible, or political reasons." *Id.* at 32. Respondents noted that four of the withheld documents were described as discussing Delphi and claimed these were "facially relevant." *Ibid.* They further argued that *in camera* review of other documents was "likely to unearth equally relevant material." *Ibid.* As for the requirement that they demonstrate that the subpoenaed material would offer

important evidence not otherwise available, they asserted: "there is no reason to believe that any of these documents are inadmissible. None of them are available through any other means." *Ibid.*

3. Orders Regarding Production of Documents

a. In July 2016, the district court ordered the government to submit all of the withheld materials for *in camera*, *ex parte* review, along with explanations for the privileges asserted. JA 8 (7/5/16 Min. Order). The government did so. JA 185 (Notice of Production, Dkt. No. 40).

In December 2016, the court ordered Treasury to produce to respondents 120 documents that had been withheld solely on the basis of the deliberative process privilege. JA 172 (Dkt. No. 42, at 4). The order also directed Treasury to submit a revised privilege log along with the relevant documents for *in camera* review. JA 181. The government did so. *See* JA 267 (Notice of Compliance, Dkt. No. 43).

b. On April 13, 2017, the district court ordered the government to disclose all of the sixty-three presidential communications over which the Office of the President had asserted the presidential communications privilege. JA 147-55 (Dkt. No. 45, at 3-11). The court described the documents as falling into four categories: "(1) drafts of presidential speeches; (2) personal requests for information by President Obama; (3) draft memoranda from staffers to Dr. Lawrence Summers, the Director of the National Economic Council, Assistant to the President for Economic Policy, and co-chair of the Presidential Task Force on the Auto Industry ('Auto Task Force'); and (4)

electronic mail conversations among Auto Team members concerning advice to be provided to the President." JA 148 (footnotes omitted).

The court held that the presidential communications privilege plainly covered all sixty-three documents. JA 148-54 (rejecting respondent's arguments to the contrary). The court also held, however, that the privilege was overcome by respondents' need for the documents.

The court described the applicable standard as requiring that respondents show "(1) that the subpoenaed material likely contains evidence 'directly relevant to issues that are expected to be central to the trial[;]' and (2) that the evidence 'is not available with due diligence elsewhere.'" JA 154 (quoting *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997)). The court then noted respondents' "assert[ion] that they need the withheld material because it may show pressure exerted by Treasury or the White House to terminate the Delphi Plan for impermissible or political reasons," JA 154-55, and respondents' "represent[ation] that the materials are unavailable through any other means," JA 155. Summarily relying on the "reasons advanced by Respondents," the court held that respondents had made "'at least a preliminary showing of necessity for information that is not merely demonstrably relevant, but indeed substantially material to their case.'" *Ibid.* (quoting *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977)).

c. After Treasury requested a stay pending any appellate review, Dkt. No. 46, the district court directed Treasury to file a motion for reconsideration, and the

government did so. Dkt. No. 50. On June 7, 2017, the district court granted the motion in limited part. JA 34 (Dkt. No. 53). The court "modified" its prior order to require the government to produce "only . . . those portions of the documents that relate to General Motors, Delphi Corporation, or the Pension Benefit Guaranty Corporation." JA 36. The court ordered the government to "produce the redacted versions of those sixty-three documents to respondents by no later than June 30, 2017." *Ibid.* And the court ordered that "until the time for seeking appellate review passes—and during the pendency of any appeal should one be taken—the sixty-three documents shall remain under seal in Chambers." *Ibid.*

On June 12, the government timely filed a notice of appeal. JA 32 (Dkt. No. 55).

d. On June 19, Treasury asked the district court to clarify the nature of the production order and again sought a stay. Dkt. No. 58. The district court vacated the production deadline in order to give further consideration to Treasury's stay request. JA 10 (6/23/17 Min. Order). On July 12, the court denied the government's request for a stay. The court ordered Treasury to "produce the portions of the documents at issue that relate to (1) General Motors, (2) Delphi Corporation, or (3) the Pension Benefit Guaranty Corporation by no later than July 21, 2017 pursuant to a protective order agreed to by the parties." JA 10 (6/12/17 Min. Order).

On July 13, the government timely noticed an appeal from the July 12 order. JA 12 (Dkt. No. 63). The government's two appeals are consolidated here. *See* Order of

July 18, 2017, Nos. 17-5142, 17-5164 (D.C. Cir.).

4. Proceedings in the Court of Appeals

On July 17, Treasury asked this Court to stay the district court's disclosure order. The Court granted an administrative stay and directed the government to provide the sixty-three documents for the Court's *in camera* review. The Court also directed Treasury to explain "on what basis the Department of the Treasury is asserting the presidential communications privilege." Order of July 26, 2017, Nos. 17-5142, 17-5164 (D.C. Cir.). Treasury's response explained that the institutional privilege protecting presidential communications is invoked on behalf of the Office of the President.

Respondents then moved to dismiss Treasury's consolidated appeals for lack of jurisdiction and requested that this Court summarily affirm the judgment of the district court. Resp'ts Dispositive Mot. 22-23, Nos. 17-5142, 17-5164 (D.C. Cir.).

On August 11, the Court granted Treasury's motion for a stay pending appeal and denied respondents' motion to dismiss for lack of jurisdiction and for summary affirmance. Order of Aug. 11, 2017, at 1-2, Nos. 17-5142, 17-5164 (D.C. Cir.) (Order of Aug. 11). The Court concluded that it had jurisdiction to review the district court's June 7 and July 12 orders, explaining that the orders are "final and reviewable under 28 U.S.C. § 1291." *Id.* at 1. The Court observed that the "district court's orders in this free-standing litigation over subpoenas directed to the Department of the Treasury concluded the case and directed release of the privileged documents." *Ibid.* (citing

Linder v. Department of Def., 133 F.3d 17, 22 (D.C. Cir. 1998)). "Contrary to the appellees' argument," the Court reasoned, "the appellant need not be held in contempt to render the judgment final given the unique separation of powers concerns embedded in the presidential communications privilege." Order of Aug. 11, at 1-2 (citing *United States v. Nixon*, 418 U.S. 683, 708 (1974)) (noting that "the contempt requirement is ill fitted to the situation at present where the party that holds the documents—the Department of the Treasury—is neither making the decision to assert the privilege, nor empowered to release the documents," as "[t]hose decisions are vested in the Office of the President").[3]

SUMMARY OF ARGUMENT

The "presumptive privilege" that attaches to presidential communications is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). A litigant—especially a litigant in an ordinary civil proceeding—bears a heavy burden in overcoming a proper assertion of this constitutional privilege.

In its disclosure order, the district court signally failed to apply the correct standard for determining whether respondents carried their heavy burden. The court recognized that *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), established the standard for the "focused demonstration of need," *id.* at 746, that a party must make

[3] In light of its jurisdictional ruling, the Court dismissed Treasury's alternative request for mandamus relief as moot. Order of Aug. 11, at 2.

to overcome the presidential communications privilege when materials are sought in connection with a criminal proceeding. But the court evinced no recognition of the higher standard appropriate for civil cases, *see Cheney v. U.S. Dist. Court*, 542 U.S. 367, 384 (2004); *see also In re Sealed Case*, 121 F.3d. at 743-44, 753, and, having cited the standard set out in *In re Sealed Case,* it made no attempt to test respondents' assertions on the basis of those criteria. Instead, quoting *Dellums v. Powell,* 561 F.2d 242, 249 (D.C. Cir. 1977), the court concluded that it was sufficient that respondents had (in the court's view) "made 'at least a preliminary showing of necessity for information that is not merely demonstrably relevant but indeed substantially material to their case.'" JA 155.

The district court's reliance on *Dellums* was misplaced. This Court applied that standard in addressing a claim of privilege asserted only by a former President after he had left office, and the Court questioned whether this institutional privilege could validly be asserted at all in that manner. 561 F.2d at 245, 247. Here, in contrast, the privilege was asserted on behalf of the Office of the President and continues to be asserted on behalf of the Office of the President.

The district court's cursory analysis did not conform to the requirements of *In re Sealed Case,* still less the more stringent standard appropriate in civil litigation. Even under *In re Sealed Case*, overcoming the presidential communications privilege would require respondents to have demonstrated that "the subpoenaed materials likely contain[] important evidence" that is "directly relevant" to the central issues in their

underlying litigation, and that this evidence is "still needed" because it is "not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d at 753-55.

The court described no respect in which *any* of the documents, much less *all* of the documents, bear on the claims respondents have asserted in the underlying litigation—let alone are sufficiently critical to the central issues in the underlying suit as to overcome the presidential communications privilege. *Cf. Cheney*, 542 U.S. at 385. Although the government provided the documents for the district court's *in camera* review, the court made no attempt to differentiate among the documents or assess why a particular document or type of document might be crucial to respondents' claims.

Having failed to identify any respect in which any document offered evidence critical to respondents' case, the court could not and did not explain why all sixty-three documents were "still needed." *In re Sealed Case*, 121 F.3d at 754. The court did not address whether any of the information in the documents could be obtained elsewhere—whether in documents respondents already obtained from Treasury and the extensive discovery obtained from the Pension Benefit Guaranty Corporation, or elsewhere. *See In re Sealed Case*, 121 F.3d at 755 (requiring party seeking materials, even for a criminal proceeding, to show that such "evidence is not available with due diligence elsewhere"). The court instead simply relied upon respondents' unsupported assertion that the "materials are unavailable through any other means." JA 155.

In sum, respondents have not carried their burden of overcoming a valid assertion of the presidential communications privilege, and the district court failed to execute its responsibilities under governing law in ordering disclosure.

STANDARD OF REVIEW

This Court will "generally review district court decisions enforcing document subpoenas only for arbitrariness or abuse of discretion," but where the "[appellant] argues that the district court applied the wrong legal standard, [the Court's] review . . . is *de novo*." *In re Sealed Case*, 146 F.3d 881, 883-84 (D.C. Cir. 1998); *see United States v. Deloitte LLP*, 610 F.3d 129, 134 (D.C. Cir. 2010) (same). This Court gives no deference to a discovery order "if it rests upon a misapprehension of the relevant legal standard or is unsupported by the record." *In re Subpoena Served Upon the Comptroller of the Currency,* 967 F.2d 630, 633 (D.C. Cir. 1992). And deference is only appropriate where there is "some articulation of the district court's reasons for its ruling." *In re Sealed Case*, 121 F.3d 729, 740 (D.C. Cir. 1997).

ARGUMENT

THE DISTRICT COURT DEPARTED FROM CONTROLLING LAW IN ORDERING THE DISCLOSURE OF DOCUMENTS PROTECTED BY THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE.

A. It Was Respondents' Burden to Demonstrate, and the District Court's Responsibility to Find, Specific Grounds for Overcoming the Privileged Status of the Presidential Communications at Issue.

1. The "presumptive privilege" that attaches to presidential communications is "fundamental to the operation of Government, and inextricably rooted in the

separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974) (citation omitted); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege's "constitutional origins").

The privilege is "necessary to guarantee the candor of presidential advisers," *In re Sealed Case*, 121 F.3d at 743, and—as the Supreme Court has observed—"[t]he President's need for complete candor and objectivity from advisers calls for great deference from the courts." *Nixon*, 418 U.S. at 706. Protecting presidential communications from disclosure provides necessary "protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking," by ensuring that the "President and those who assist him . . . [are] free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708; *see also Loving v. Department of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008) (explaining that the privilege "preserves the President's ability to obtain candid and informed opinions"); *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Documents subject to the presidential communications privilege are shielded in their entirety. *In re Sealed Case*, 121 F.3d at 745. And the privilege "covers final and post-decisional materials as well as pre-deliberative ones." *Ibid.*

2. Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is "more difficult to surmount" than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746.

In *Nixon*, the Supreme Court recognized that a party may overcome the presidential communications privilege if it can demonstrate its "specific need" for the subpoenaed materials as "evidence in a pending criminal trial." 418 U.S. at 713. The Court explained that this reflects the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 707 (explaining that it would "gravely impair the role of the courts under Art. III," if the President were understood to have "an absolute privilege . . . against a subpoena essential to enforcement of criminal statutes"). The Court described "the manifest duty of the courts to vindicate" the "right to the production of all evidence at a criminal trial," given its "constitutional dimensions." *Id.* at 711; *see also Cheney v. U.S. Dist. Court*, 542 U.S. 367, 385 (2004) (explaining that the Supreme Court ordered production in *Nixon* "where a court's ability to fulfill its constitutional responsibility" in an ongoing criminal case "hinge[d] on the availability of certain indispensable information").

Consistent with the Supreme Court's guidance, this Court has explained that a party seeking otherwise privileged presidential communications for use in a criminal matter must first demonstrate "that each discrete group of the subpoenaed materials likely contains important evidence"—that is, evidence "directly relevant to issues that are expected to be central to the trial," and not evidence that is "only tangentially relevant or would relate to side issues." *In re Sealed Case*, 121 F.3d at 753-55. The party must also show "that this evidence is not available with due diligence elsewhere"—that is., notwithstanding other sources for information, the privileged documents are

"still needed." *Ibid.* (explaining that this standard reflects the Supreme Court's "insistence that privileged presidential communications should not be treated as just another source of information").

3. Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The Supreme Court "explicitly limited its ruling [in *Nixon*] to demands for presidential materials relevant to a criminal trial, stating '[we] are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation[.]'" *In re Sealed Case*, 121 F.3d at 743 (quoting *Nixon*, 418 U.S. at 712 n.19). The Court has since made clear that in ordinary civil proceedings a party seeking to overcome the weighty interests that favor presidential confidentiality carries an especially heavy burden. The greater scrutiny applicable in such proceedings is appropriate because "[w]ithholding [privileged] information" in civil discovery does not threaten the "'essential functions'" of the judicial branch as it might in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *Nixon*, 418 U.S. at 707). "As *Nixon* recognized, the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" as a request for information in a criminal case. *Ibid.* (quoting *Nixon*, 418 U.S. at 713); *see also In re Sealed Case*, 121 F.3d at 754 (noting "the [*Nixon*] Court's repeated emphasis on the importance of access to relevant evidence in a criminal proceeding"); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) ("[T]he

sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions.") (emphasis added).

B. In Failing to Recognize That Respondents Had Not Met Their Burden, The District Court Applied the Wrong Legal Standard and Did Not Undertake the Inquiry Mandated by This Court's Decisions.

Having found that the sixty-three documents at issue are subject to the presidential communications privilege, the district court nonetheless ordered that they be disclosed based on respondents' unsubstantiated assertions of need. The court did so on the basis of an incorrect legal standard and without undertaking the analysis required by this Court's precedents.

1. The district court noted, at the beginning of its discussion, the standards set out in *In re Sealed Case*. As we have discussed, a still more stringent standard applies in ordinary civil cases. In any event, however, the court failed to apply the standard applicable in either civil or criminal litigation. Instead, the court stated that "for substantially the same reasons advanced by Respondents, the Court is persuaded that Respondents have made 'at least a preliminary showing of necessity for information that is not merely demonstrably relevant but indeed substantially material to their case.' *Dellums v. Powell,* 561 F.2d 242, 249 (D.C. Cir. 1977)." JA 155.

The district court did not explain why it regarded the *Dellums* standard as appropriate, and no justification exists for its invocation. In *Dellums*, the presidential communications privilege was "urged solely by a former president" who had left

office, and the privilege was not invoked or supported at any stage by the Office of the President. *Dellums*, 561 F.2d at 247; *see id.* 243-48. This Court held that even "[a]ssuming arguendo a former President may present a claim of presidential privilege," such a claim is "entitled to lesser weight than that assigned the privilege asserted by an incumbent President." *Dellums*, 561 F.2d at 245; *accord id.* at 247 ("[I]f he is to be allowed to do so, such a claim carries much less weight."). The Court made clear that in those circumstances, the privilege is of "lesser significance" when deciding "whether the claim is overcome." *Dellums*, 561 F.2d at 248. Here, in contrast, the privilege was invoked by the Office of the President in 2015, and the government continues to defend its assertion in this litigation on behalf of the Office of the President.

2. By any measure, the district court's blanket disclosure order falls far short of meeting the requirements for overcoming the presidential communications privilege. The court provided virtually no explanation for its decision, failing to scrutinize separately "each discrete group of the subpoenaed materials," *In re Sealed Case*, 121 F.3d at 754, let alone the separate documents that were before the court.

Although the district court stated that it was "persuaded" that respondents had made a "'showing of necessity for information that is . . . substantially material to their case,'" it is wholly unclear what the court believed constituted such a showing on the part of respondents. JA 155 (quoting *Dellums,* 561 F.2d at 249). The court—which had received all of the documents for *in camera* review—did not indicate why any,

much less all, of the sixty-three documents contain evidence pertaining to, much less establishing, respondents' assertions of political pressure. Nor did the court explain why evidence of political pressure would be relevant to respondents' claims in the underlying litigation, let alone why it would be sufficiently critical to those claims to override the presidential communications privilege. Indeed, the court nowhere considered how the documents described in the government's privilege logs and declaration—and available to the district court for *in camera* review—could bear on respondents' theories. For example, neither respondents nor the court offered any indication of how a draft presidential speech could provide evidence of clandestine pressure—much less offer evidence not already available in the thousands of documents respondents have received from Treasury and the Pension Benefit Guaranty Corporation. Respondents failed to carry their burden, and the district court failed to hold them to that task.

The district court likewise erred in uncritically accepting respondents' assertion that the requested "materials are unavailable through any other means." JA 155; *see* Dkt. No. 30, at 32 ("None of them are available through any other means."). The question identified in *In re Sealed Case* is not whether the very same documents are otherwise available; the question is whether the presidential communications at issue would add new and important *information* not available elsewhere. *See, e.g.*, *In re Sealed Case*, 121 F.3d at 755, 757. The district court made no effort to address that question and neither did respondents. Indeed, because the court did not explain why all (or

any) of the requested documents are likely to contain important evidence that bears directly on respondents' central claim against the Pension Benefit Guaranty Corporation, it is unclear how the court could have determined whether each of the documents at issue offers unique information.

This Court has warned that "privileged presidential communications should not be treated as just another source of information," and explained that the party seeking privileged documents of that nature "should be prepared to detail" its efforts "to determine whether sufficient evidence can be obtained elsewhere" and "explain why evidence covered by the presidential privilege is still needed." *In re Sealed Case*, 121 F.3d at 755. Respondents did not provide any support for their contention that the documents contained evidence not available in any of the voluminous discovery materials obtained by respondents, or elsewhere. The court committed clear and significant error in nevertheless ordering disclosure.

The absence of any such analysis is particularly striking given the volumes of material that respondents have already obtained in this litigation. These include more than one million pages of documents from the Pension Benefit Guaranty Corporation; depositions from a related bankruptcy proceeding; and access to testimony at seven congressional hearings discussing the termination of the Delphi plan. Dkt. No. 15, at 11-13, 23-24; *see also* Dkt. No. 36, at 13-14 (respondents' reply in support of motion to compel identifying other relevant information available in a

public report).[4] Moreover, following the district court's first ruling on respondents' motion to compel, JA 172, respondents also obtained from Treasury 120 documents subject to the deliberative process privilege, which respondents (in urging the court to compel disclosure) had claimed would reveal the same pressure that they speculated might be evidenced in the sixty-three presidential communications.[5] Respondents have made no effort to address this development, or show that the materials at issue here are "still needed" despite the disclosure of thousands of pages of additional documents by Treasury. *See In re Sealed Case*, 121 F.3d at 755.

In sum, after receiving 70,000 pages of discovery from Treasury, including documents subject to the deliberative process privilege, respondents have failed to explain how any of the sixty-three documents protected by the presidential communications privilege provide critical information unavailable from other sources. Had the district court engaged in the inquiry mandated by this Court's precedent, it would have had no basis for ordering blanket disclosure of the sixty-three documents subject to the presidential communications privilege.

[4] Insofar as respondents have described the documents they have received in discovery, those statements highlight the breadth of information available to respondents. *See, e.g.*, Dkt. No. 36, at 13-14.

[5] This production brought the total number of pages of documents that respondents have received from Treasury to more than 70,000.

CONCLUSION

For the foregoing reasons, the Court should reverse, or, in the alternative, vacate and remand, the district court's production order.

Respectfully submitted,

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AUGUST 2017

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32

I hereby certify that this motion complies with Federal Rule of Appellate Procedure 32 because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that it complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,744 words according to the count of Microsoft Word.

/s/ Abby C. Wright
Abby C. Wright

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system. Paper copies will be delivered to the Court by hand on August 28, 2017.

/s/ Abby C. Wright
ABBY C. WRIGHT

ADDENDUM

29 U.S.C. § 1342

(a) Authority to institute proceedings to terminate a plan
The corporation may institute proceedings under this section to terminate a plan whenever it determines that--
(1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26,
(2) the plan will be unable to pay benefits when due,
(3) the reportable event described in section 1343(c)(7) of this title has occurred, or
(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan. The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section). Notwithstanding any other provision of this subchapter, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of this subchapter.

(b) Appointment of trustee
(1) Whenever the corporation makes a determination under subsection (a) of this section with respect to a plan or is required under subsection (a) of this section to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) of this section ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the

appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.
(2) Notwithstanding any other provision of this subchapter--
(A) upon the petition of a plan administrator or the corporation, the appropriate United States district court may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee, and
(B) upon the petition of the corporation, the appropriate United States district court shall appoint a trustee proposed by the corporation for a multiemployer plan which is in reorganization or to which section 1341a(d) of this title applies, unless such appointment would be adverse to the interests of the plan participants and beneficiaries in the aggregate.
(3) The corporation and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).

(c) Adjudication that plan must be terminated
(1) If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund. If the trustee appointed under subsection (b) of this section disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or make application for such decree himself. Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) of this section (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection

(other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section. Whenever a trustee appointed under this subchapter is operating a plan with discretion as to the date upon which final distribution of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution.

(2) In the case of a proceeding initiated under this section, the plan administrator shall provide the corporation, upon the request of the corporation, the information described in clauses (ii), (iii), and (iv) of section 1341(c)(2)(A) of this title.

(3) Disclosure of termination information

(A) In general

(i) Information from plan sponsor or administrator

A plan sponsor or plan administrator of a single-employer plan that has received a notice from the corporation of a determination that the plan should be terminated under this section shall provide to an affected party any information provided to the corporation in connection with the plan termination.

(ii) Information from corporation

The corporation shall provide a copy of the administrative record, including the trusteeship decision record of a termination of a plan described under clause (i).

(B) Timing of disclosure

The plan sponsor, plan administrator, or the corporation, as applicable, shall provide the information described in subparagraph (A) not later than 15 days after--

(i) receipt of a request from an affected party for such information; or

(ii) in the case of information described under subparagraph (A)(i), the provision of any new information to the corporation relating to a previous request by an affected party.

(C) Confidentiality

(i) In general

The plan administrator, the plan sponsor, or the corporation shall not provide information under subparagraph (A) in a form which includes any information that may directly or indirectly be associated with, or otherwise identify, an individual participant or beneficiary.

(ii) Limitation

A court may limit disclosure under this paragraph of confidential information described in section 552(b) of Title 5, to authorized representatives (within the meaning of section 1341(c)(2)(D)(iv) of this title) of the participants or beneficiaries that agree to ensure the confidentiality of such information.

(D) Form and manner of information; charges

(i) Form and manner

The corporation may prescribe the form and manner of the provision of information under this paragraph, which shall include delivery in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to individuals to whom the information is required to be provided.

(ii) Reasonable charges

A plan sponsor may charge a reasonable fee for any information provided under this paragraph in other than electronic form.

(d) Powers of trustee

(1)(A) A trustee appointed under subsection (b) of this section shall have the power--

(i) to do any act authorized by the plan or this subchapter to be done by the plan administrator or any trustee of the plan;

(ii) to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee;

(iii) to invest any assets of the plan which he holds in accordance with the provisions of the plan, regulations of the corporation, and applicable rules of law;

(iv) to limit payment of benefits under the plan to basic benefits or to continue payment of some or all of the benefits which were being paid prior to his appointment;

(v) in the case of a multiemployer plan, to reduce benefits or suspend benefit payments under the plan, give appropriate notices, amend the plan, and perform other acts required or authorized by subtitle (E) of this subchapter to be performed by the plan sponsor or administrator;

(vi) to do such other acts as he deems necessary to continue operation of the plan without increasing the potential liability of the corporation, if such acts may be done under the provisions of the plan; and

(vii) to require the plan sponsor, the plan administrator, any contributing or withdrawn employer, and any employee organization representing plan participants to furnish any information with respect to the plan which the trustee may reasonably need in order to administer the plan.

If the court to which application is made under subsection (c) of this section dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) of this section, within 30 days after the date on which the trustee is appointed under subsection (b) of this section, the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of subchapter I of this chapter (except as provided in subsection (d)(1)(A)(v) of this section). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.

(B) If the court to which an application is made under subsection (c) of this section issues the decree requested in such application, in addition to the powers described in subparagraph (A), the trustee shall have the power--

(i) to pay benefits under the plan in accordance with the requirements of this subchapter;

(ii) to collect for the plan any amounts due the plan, including but not limited to the power to collect from the persons obligated to meet the requirements of section 1082 of this title or the terms of the plan;

(iii) to receive any payment made by the corporation to the plan under this subchapter;

(iv) to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan;

(v) to issue, publish, or file such notices, statements, and reports as may be required by the corporation or any order of the court;

(vi) to liquidate the plan assets;

(vii) to recover payments under section 1345(a) of this title; and

(viii) to do such other acts as may be necessary to comply with this subchapter or any order of the court and to protect the interests of plan participants and beneficiaries.

(2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this subchapter to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this paragraph, the term "interested party" means--

(A) the plan administrator,

(B) each participant in the plan and each beneficiary of a deceased participant,
(C) each employer who may be subject to liability under section 1362, 1363, or 1364 of this title,
(D) each employer who is or may be liable to the plan under section[1] part 1 of subtitle E of this subchapter,
(E) each employer who has an obligation to contribute, within the meaning of section 1392(a) of this title, under a multiemployer plan, and
(F) each employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer described in subparagraph (C), (D), or (E).
(3) Except to the extent inconsistent with the provisions of this chapter, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of Title 11, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 1002 of this title and under section 4975(e) of Title 26 (except to the extent that the provisions of this subchapter are inconsistent with the requirements applicable under part 4 of subtitle B of subchapter I of this chapter and of such section 4975).

(e) Filing of application notwithstanding pendency of other proceedings
An application by the corporation under this section may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding, or any proceeding to reorganize, conserve, or liquidate such plan or its property, or any proceeding to enforce a lien against property of the plan.

(f) Exclusive jurisdiction; stay of other proceedings
Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of the United States having jurisdiction over cases under chapter 11 of Title 11. Pending an adjudication under subsection (c) of this section such court shall stay, and upon appointment by it of a trustee, as provided in this section such court shall continue the stay of, any pending mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property. Pending

such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the plan or any other suit against the plan.

(g) Venue

An action under this subsection may be brought in the judicial district where the plan administrator resides or does business or where any asset of the plan is situated. A district court in which such action is brought may issue process with respect to such action in any other judicial district.

(h) Compensation of trustee and professional service personnel appointed or retained by trustee

(1) The amount of compensation paid to each trustee appointed under the provisions of this subchapter shall require the prior approval of the corporation, and, in the case of a trustee appointed by a court, the consent of that court.

(2) Trustees shall appoint, retain, and compensate accountants, actuaries, and other professional service personnel in accordance with regulations prescribed by the corporation.