ORAL ARGUMENT SCHEDULED OCTOBER 27, 2017

Consolidated Nos. 17-5142, 17-5164

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 (Judge Emmet G. Sullivan)

BRIEF OF APPELLEES

Anthony F. Shelley
Counsel of Record
Timothy P. O'Toole
Michael N. Khalil
Miller & Chevalier Chartered
900 Sixteenth St. NW
Washington, DC 20006
Telephone: (202) 626-5800
Facsimile: (202) 626-5801
Email: ashelley@milchev.com
Email: totoole@milchev.com
Email: mkhalil@milchev.com

September 20, 2017

Counsel for Respondents-Appellees

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

LIST OF PARTIES AND *AMICUS CURIAE*

All parties, intervenors, and *amici* appearing before the District Court and in this Court are listed in the Brief for Petitioner-Appellant.

RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Petitioner-Appellant.

RELATED CASES

Respondents-Appellees are not aware of any related cases.

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GLOSSARY

ERISA	Employee Retirement Income Security Act
JA	Joint Appendix
PBGC	Pension Benefit Guaranty Corporation
RA	Addendum to Retirees' Response to Emergency Motion For Stay
SIGTARP	Special Inspector General for the Troubled Asset Relief Program

INTRODUCTION

This appeal concerns the operation of what can be called the "needs" test articulated in *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977), and *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), applicable to overcoming an assertion of the presidential communications privilege. The question arises here in the setting of the U.S. Department of Treasury seeking to shield certain documents from disclosure, the vast majority of which were never reviewed at all by a President. In this appeal, Treasury seeks to alter well-settled law so as to diminish the circumstances in which a litigant's need for documents can overcome an assertion of the presidential communications privilege.

In 2012, Respondents (sometimes also referred to as "Appellees" or "the retirees"), in connection with a federal lawsuit they brought in Michigan to challenge the 2009 termination of their pension plan by the Pension Benefit Guaranty Corporation ("PBGC"), served upon Treasury a narrow subpoena *duces tecum* seeking documents from three former Treasury officials. A key issue posed in the underlying Michigan lawsuit is whether the PBGC acquiesced in the termination of the pension plan "as a result of pressure imposed by Treasury and the related U.S. Auto Task Force to support their efforts to restructure the auto

industry in general and GM [*i.e.*, General Motors Corporation] in particular." JA241 (internal citation omitted).[1]

In 2015, a White House Counsel at the time, on behalf of the Office of the President, asserted the presidential communications privilege over 63 documents responsive to the subpoena, only three of which had ever been reviewed by President Obama. In 2017, after two hearings, several *in camera* examinations of the documents, and briefing in which Treasury "failed to substantively engage in the needs analysis or attempt to distinguish the cases upon which Respondents rely," JA155, the District Court ordered disclosure of the documents, redacted to remove irrelevant material. The District Court held that the presidential communications privilege applied to the documents in question, but that, under the standards this Court set out in *Dellums* and *In re Sealed Case*, Respondents' specific litigation need was sufficient to require the production of portions of those documents pursuant to a protective order that would limit the documents' use to Respondents' litigation and preclude general publication of the documents.

On appeal, Treasury advances two alternative arguments. First, Treasury asserts that the District Court employed the wrong legal standard, though it never articulates the alternative standard that supposedly should have governed.

[1] "JA" citations are to the Joint Appendix.

Treasury's contention is ultimately unpersuasive. Its superficial analysis fails even to acknowledge the balancing test underlying the needs analysis and, consequently, fails to address the substantially limited interest under that test that the government has in maintaining the confidentiality of these particular documents.

Through its second argument, Treasury seeks a second bite at the apple, trying to persuade this Court that the discretion ordinarily afforded a district court's determinations, *see In re Sealed Case*, 121 F.3d at 740, is inappropriate here because the District Court supposedly failed to conduct the inquiry required by this Court's precedents. Treas. Br. at 1. To the contrary, the District Court's decision is well supported by a record developed over five years, in which the court went out of its way to provide Treasury with multiple opportunities to supplement its privilege assertions; and the District Court plainly explained the basis of its legal determinations. Because the District Court faithfully applied this Court's precedents in making its limited disclosure order, the District Court's ruling requiring disclosure should be affirmed.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this miscellaneous action pursuant to 28 U.S.C. § 1331. In its Order of Aug. 11, 2017, this Court concluded that it has jurisdiction over the appeal under 28 U.S.C. § 1291 because the District Court orders under review "concluded the case." D.C. Cir. Order at 1 (D.C. Cir.

#1688366, Aug. 11, 2017). Respectfully, Appellees continue to believe that the Court lacks appellate jurisdiction, for all the reasons discussed in their motion to dismiss for lack of jurisdiction, and they preserve that jurisdictional argument for any further review. *See* Appellees' Mot. to Dismiss the Consolidated Appeals, for Summ. Aff. in Any Appeal, or for Denial of Any Mandamus Pet. Insofar as the Court Construes Any Appeal as a Mandamus Pet. at 7-11 (D.C. Cir. #1686678, July 31, 2017).

STATEMENT OF ISSUE PRESENTED

Whether the District Court abused its discretion in finding, under *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977), and *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), that Respondents made a showing of litigation need for the 63 documents over which Treasury has asserted the presidential communications privilege sufficient to justify the production of the relevant portions of those documents pursuant to a protective order.

RELEVANT STATUTES AND REGULATIONS

Relevant portions of the pertinent statutory and regulatory provisions are set out in Treasury's Statutory Addendum accompanying its opening brief.

STATEMENT OF THE CASE

A. *Black v. PBGC*

1. The Nature of the Underlying Michigan Lawsuit

Respondents are retired salaried employees of the Delphi Corporation ("Delphi") and an association of retired salaried employees of Delphi; they are also plaintiffs in a lawsuit filed in the Eastern District of Michigan (the "Michigan Court"), styled as *Black v. PBGC*, Case No. 2:09-cv-13616. *Black v. PBGC* challenges the 2009 termination of the retirees' pension plan (the "Salaried Plan" or the "Plan") by the PBGC.[2] The PBGC purported to accomplish that termination via an agreement with the Plan's administrator during a time when Delphi was in bankruptcy and the federal government was restructuring GM and other players in the U.S. automobile industry. Delphi had declared bankruptcy in 2005 and emerged from bankruptcy, after the termination of the Plan, in 2009.

[2] The underlying Michigan litigation, *Black v. PBGC*, Case No. 2:09-cv-13616 (E.D. Mich.), will be referenced in this brief as *Black v. PBGC*, and ECF references relevant to *Black v. PBGC* are to the Michigan Court's docket, with page numbers for a particular docket entry referring to the page numbers in the original document (not those in the ECF header). References simply to the "District Court" (as opposed to the "Michigan Court") are to Judge Sullivan's proceedings below, and references to the "D.D.C. ECF No." are to the District Court docket below, with page numbers for a particular docket entry again referring to the page numbers in the original document (not those in the ECF header).

The retirees allege in Count One of *Black v. PBGC* that the agreement between the PBGC and the Plan's administrator to terminate the Plan was itself unlawful because the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, requires the PBGC to obtain a termination decree from a United States district court, which the PBGC failed to do. A district court may grant such a decree only upon a finding that a 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 [PBGC's insurance] fund." 29 U.S.C. § 1342(c)(1). Count Two alleges that even if ERISA allows a termination-by-agreement with a plan administrator, any actions undertaken by a plan's administrator in connection with a plan termination are fiduciary in nature and, therefore, are valid only if done in accordance with ERISA's duty of loyalty, a requirement patently violated by the termination agreement. *See Black v. PBGC*, ECF No. 145, ¶ 43 (citing 29 U.S.C. §§ 1002(21)(A), 1104(a)). In Count Three, Respondents allege that even if ERISA allows for a termination-by-agreement with a conflicted fiduciary, the U.S. Constitution does not, as it would amount to a taking of the retirees' property without due process. *See id.* ¶ 52. Finally, Respondents allege in Count Four of *Black v. PBGC* that, even if the PBGC could terminate a pension plan by agreement, its agreement in this instance was illegal because it resulted

substantively in a termination contrary to the statutory prerequisites in § 1342(c)(1) for termination. *See id.* ¶ 56.[3]

2. Events Leading to the Underlying Michigan Lawsuit

Full understanding of the nature of the claims in *Black v. PBGC*, especially Count Four (which is probably the most critical for purposes of this appeal, *see infra* pp. 13-14), requires a relatively detailed review of the relationship between Delphi and GM, the events leading to the termination of the Plan, and the roles played by the various government actors. Starting with the relationship between Delphi and GM, "Delphi consisted of divisions and subsidiaries of GM until GM's divestiture of Delphi in 1999." *See* JA833 (Decl. of R. Pappal). GM was the original sponsor of what became the Delphi Salaried Plan, and most of the Plan's participants had spent the majority of their careers as GM employees. From the time of the spin-off in 1999, through the time of the Salaried Plan's termination, Delphi was GM's largest component parts supplier. *Id*. "Consequently, if Delphi ever cease[d] shipping even a small fraction of production parts to GM, the GM

[3] Treasury implies that the summary termination of a pension plan by agreement between the PBGC and a plan administrator is unremarkable, given the passing approval of that approach by one court of appeals. *See* Treas. Br. 3 (citing *Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197 (2d Cir. 1987)). No other court of appeals has so held; moreover, as the retirees have explained to the Michigan Court, *Jones & Laughlin* would not even be good law in the Second Circuit at this juncture, given more recent developments in due-process jurisprudence.

plants relying on such shipments may run out of inventory of such parts and have to shut down within a matter of days." *Id*. "In short, a prolonged cessation in the supply of parts from Delphi to GM would have [had] a devastating effect on GM, its ability to reorganize, and the communities that depend on employment by GM and its community of parts suppliers." JA834.

At the time the Salaried Plan was terminated in 2009, it was, compared to other large pension plans, a relatively well-funded pension plan (*see*, *e.g.*, JA265 (Watson Wyatt June 30, 2009 letter certifying 85.62% funding level)), and there were – the retirees have contended – a number of viable alternatives to termination that a court might have considered in lieu of termination, the most likely (though not only) option being a reassumption of the Salaried Plan by GM. *See, e.g.*, JA818 (March 20, 2009 Delphi slide presentation noting that GM reassumption of Delphi pension plans was the "preferred likely outcome"). Because the PBGC had significant liens and claims over Delphi assets sufficient to cover the Plan's underfunding, the PBGC had substantial leverage then to negotiate such a GM reassumption; and in fact the PBGC had, at earlier stages of the bankruptcy proceedings, been actively advocating for this result. *See*, *e.g.*, JA517 (D. Cann Dep.) (the PBGC was in favor of a GM reassumption and was in fact "cheerleading for the transfer, . . . utilizing [the PBGC's] liens overseas as potential leverage to get it done").

Things changed when the Auto Task Force came into being. President Obama appointed the Auto Task Force, housed within Treasury, on February 15, 2009, to oversee the Administration's efforts to support and stabilize the domestic automotive industry; Treasury then hired three individuals, Matthew Feldman, Steven Rattner, and Harry Wilson, to serve on the "Auto Team," at Treasury, which provided staff level support for the Auto Task Force. *See* D.D.C. ECF No. 15-7 (Decl. of R. Desai) ¶ 4. Mr. Rattner was appointed to lead the Auto Team, with Mr. Wilson and Mr. Feldman reporting to him.

"What followed was the Auto Team's direct involvement in the decisions affecting GM. Treasury's Auto Team used their financial leverage as GM's only lender to significantly influence the decisions GM made during the time period leading up to and through GM's bankruptcy." JA298 (Report of the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP") on Treasury's Role in the Decision for GM to Provide Pension Payments to Delphi Employees). Indeed, "the Auto Team used their leverage as GM's largest lender to influence and set the parameters for GM to make decisions," JA301, specifically "press[ing] GM to be *less generous* in relation to Delphi and pensions." JA303.

From that point on, Respondents contend, Treasury and the Auto Task Force sought the then politically-expedient course of limiting disbursements from the Troubled Asset Relief Program (which would have increased if GM reassumed the

Salaried Plan) and instead pressed to transfer the Salaried Plan's liabilities to the PBGC's ledger. Though previously all-in-favor of GM's reassumption of the Plan, the PBGC was susceptible to Treasury's and the Auto Task Force's pressure because, among other things, it is a government corporation located within the Department of Labor, and it is governed by a three person board of directors that includes the Secretary of the Treasury. 29 U.S.C. § 1302(a) & (d).[4]

Once the Auto Task Force was created, Treasury informed both Delphi and GM that there would be no additional financial support to Delphi, in any form, absent a "global solution." *See* JA742 (M. Feldman Dep. Tr. in bankruptcy proceeding) ("I think our position has always been the same, which is if Delphi wanted funding from General Motors, there needed to be a signed deal that could

[4] While Treasury suggests (*see* Treas. Br. 23) that there is no evidence from discovery indicating that the PBGC did or would succumb to any pressure, Treasury is, frankly, unlearned as to the full discovery Respondents have obtained. More to the point, Respondents provided the District Court with ample briefing on this point, *see, e.g.*, D.D.C. ECF No. 36 at 12-14, citing, for instance, extensively to SIGTARP's report. Beyond that report, the District Court had additional documentary evidence to consider in this regard. As just one example, in a memorandum dated a few days prior to the Auto Task Force's creation, Compass Advisors, one of the PBGC's bankruptcy advisors, noted that the PBGC was still engaged in a "full court press to convince GM and Government officials that the 414(L) transfer [of Delphi pensions back to GM] is in everyone's best interest [as] GM doesn't need two classes of employees and should provide pensions to all retirees." JA591 (Feb. 13, 2009 Memo from Compass Advisers to PBGC). For Treasury, it apparently was just coincidence that the PBGC immediately changed its position dramatically upon the Auto Task Force's intervention.

lead to emergence from Chapter 11.")). In order to achieve its global solution, Treasury took the lead in vetting offers from potential acquirers of Delphi and in deciding what form a new or reorganized Delphi would ultimately take. *See generally* JA698-703 (Decl. of J. Sheehan).

Both GM and Treasury concluded that there could be no global solution that would secure GM's supply while Delphi assets were subject to the threat of PBGC liens and claims. *See* JA828-29 (Decl. of R. Westenberg) ("neither GM nor Parnassus (nor presumably any other potential purchaser) is willing to purchase the assets (or shares in the non-debtor affiliates that own the assets) while they are subject to the threat of the PBGC liens"); JA759 (M. Feldman Dep. in bankruptcy proceeding) ("If I understand, if there could not have been a consensual resolution with the PBGC, and it would have taken 3 months to terminate the pension plan . . .you would have had to weigh that delay in Delphi emergence against whatever economic benefits you had against – in not taking on the liability."). As a result, Treasury's desire to arrive at a global solution necessarily required that it deal with Delphi's pension plans and the PBGC's associated liens and claims.

Treasury thereafter took over (from GM) negotiations with the PBGC. The communication between Treasury and the PBGC on Delphi issues took place almost exclusively through two individuals, Joe House at the PBGC, and Treasury's Matt Feldman. *See* JA443 (V. Snowbarger Dep.); JA383 (J. House

Dep.). Mr. Feldman testified that he began these discussions "trying to reach an agreement where the salaried Delphi plans would be terminated and General Motors would assume the hourly pension plans." JA748 (M. Feldman Dep. in bankruptcy proceeding). As to the PBGC' stance in the negotiations, the PBGC's negotiator has admitted that "the word 'negotiation' doesn't really describe the nature of the liasing. It was much more of a – a coordination exercise." JA356. When asked specifically about the PBGC's efforts to persuade Treasury to fund the Delphi plans, Mr. House testified that he didn't "have [a] recollection of trying to persuade Treasury of anything." JA364.

Eventually, according to Mr. Rattner, "GM came to the Auto Team because 'GM wanted to do something for the [Delphi] Salaried retirees.'" JA318 (alteration in original). Treasury forbade GM from providing this assistance, because Mr. Rattner "thought there was nothing defensible from a commercial standpoint that could be done for the Delphi salaried retirees." *Id*. This "commercially-reasonable standard doesn't exist other than through the auto team and through TARP. It's the marching orders that the [leaders of] the Auto Task Force . . . give to the auto team as to how they should be making decisions." D.D.C. ECF No. 15-12 (Test. of C. Romero of SIGTARP before House Oversight Committee) at 44.

3. Relevant Proceedings in the Michigan Court

Black v. PBGC was filed eight years ago in the Michigan Court. In that time, the Michigan Court has denied two dispositive motions filed by the PBGC, expressly on the grounds that discovery was necessary for the resolution of Respondents' claims against the PBGC. Nonetheless, the PBGC (and Treasury) initially resisted any discovery in the Michigan Court.[5] Respondents, accordingly, moved to compel discovery, which was effectively granted by order of the Michigan Court on September 1, 2011. *Black v. PBGC*, ECF No. 193.

In that order, Judge Tarnow defined the scope of discovery in *Black v. PBGC*, stating that:

> In terms of addressing the scope of discovery for purposes of entering a scheduling order – the Court's initial focus, keeping the above case law in mind, is on Count 4 and 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 before this 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."

Black v. PBGC, ECF No. 193 at 3-4.

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[5] As the Treasury notes in its opening brief, it was for a time a party to *Black v. PBGC*. *See* Treas. Br. at 3 n.1. While a party to *Black v. PBGC*, the Treasury argued to the Michigan Court that Respondents should not be allowed *any* discovery in the case, even from the PBGC. *See*, *e.g.*, *Black v. PBGC*, ECF No. 188.

In entering this order, the Michigan Court determined that the most efficient way to proceed was to permit Respondents to take discovery on their claim alleging that the PBGC could not meet the statutory criteria for termination (Count Four), and then to address the remaining statutory and constitutional claims posed by Counts One through Three, if necessary, after discovery. That approach made practical sense, given that, if Respondents could not show the absence of the statutory criteria for termination under ERISA, then the Court might avoid having to resolve the statutory and constitutional issues posed by the remaining claims.

The key question at the heart of Count Four of *Black v. PBGC*, in Respondents' view, is whether there were any alternatives to the Plan's termination in July 2009. If there were alternatives, the PBGC would not have been able to obtain under 29 U.S.C. § 1342(c) a decree adjudicating that the Plan must be terminated, and its agreement to effect termination (even if procedurally proper under ERISA or the U.S. Constitution) would substantively fail § 1342(c)'s test. All of the chief stakeholders at the time agreed that the most likely alternative to termination was a GM reassumption of the Plan, and the record demonstrates that this decision as to whether GM would reassume the Plan was left *to Treasury*. As a result, resolution of Count Four turns on Treasury's actions and decision-making during this time, evidence relating to whether Treasury pressured the PBGC to terminate the Salaried Plan (or to relent in advocating a GM reassumption), and

more general evidence relating to whether a GM reassumption of the Salaried Plan was a viable possibility.

B. *Treasury v. Black*

1. Initial Proceedings on Treasury's Challenge to Respondents' Subpoena *Duces Tecum*

In January 2012, the retirees served Treasury with what the District Court described as a "narrow" subpoena *duces tecum*, seeking "documents created, received or reviewed by three Treasury officials, over a single calendar year, relating only to Delphi." JA255. Respondents allege that these Treasury officials, (Feldman, Rattner, and Wilson) "were the three principal Treasury employees who negotiated with the PBGC to terminate the Delphi Plan." JA243.

In February 2012, Treasury moved to quash the "narrow" subpoena on three grounds: relevance, undue burden, and cumulative/duplicative information. *See* D.D.C. ECF No. 1. Because Treasury's relevance objection had also been raised by the PBGC in a separate discovery dispute in the Michigan Court and was "ripe for resolution" there, the District Court here stayed proceedings on Treasury's motion to quash pending the Michigan Court's resolution of the PBGC's relevance objection. JA4. In September 2013, following the Michigan Court's determination of the discovery dispute there, Treasury filed in the District Court here a renewed motion to quash the subpoena *duces tecum*. *See* JA245.

In June 2014, the District Court denied, on all grounds raised by Treasury, Treasury's motion to quash the subpoena *duces tecum*, in a 24-page memorandum opinion. JA239-62. Most notably, regarding Treasury's relevance objection, the court noted that "two judges in the underlying action evaluated the question of relevance for very similar materials, sought for very similar reasons, and found them relevant." JA254. Accordingly, the District Court held that the "law of the case" doctrine supported its "decision to rely on the relevance analysis performed by the Eastern District of Michigan." *Id*.

Thereafter, Respondents agreed to enter into a stipulation and protective order with Treasury, *see* JA232, that among other things, allowed Treasury until March 2015 to complete a rolling production of responsive non-privileged documents, an additional sixty days to document its privileges in a privilege log, and the opportunity to designate documents as "confidential" under the terms of the protective order. JA233-34. Further, in the stipulation and protective order, Respondents agreed to shrink further the scope of the already-narrow subpoena *duces tecum*, such that Treasury could utilize a narrow set of mutually-agreed upon search terms to determine responsiveness for electronic records. JA233. Additionally, Treasury would be deemed to have satisfied it obligations under the subpoena if it conducted a manual search of documents it had previously produced to the Special Inspector General for the Troubled Asset Relief Program and

identified as responsive those "documents relating to Delphi, the Delphi Pension Plans, or the release and discharge by PBGC of liens and claims relating to the Delphi Pension Plans." *Id.*

2. Treasury's Assertions of Privileges and the Retirees' Motion to Compel

In June 2015, Treasury produced two privilege logs to Respondents stating that Treasury was withholding roughly 1,270 responsive documents on the basis of various privileges, the bulk of which were assertions of the deliberative process privilege, along with assertions of the presidential communications privilege, the attorney-client privilege, and the work-product doctrine. Relevant here, Treasury asserted the presidential communications privilege over sixty-six of the documents.[6] JA199-231. These assertions were not supported by any declaration on behalf of President Obama or the Office of the President; nor in most cases did Treasury indicate that the President was a party to the communications at issue or otherwise explain why the privilege would apply.

The retirees raised these and other substantive and procedural deficiencies with Treasury, and when Treasury refused to address those deficiencies, the retirees moved for an order compelling the documents' production or, in the

[6] Treasury later withdrew the privilege assertion as to three of those documents, *see* JA196 ¶ 5, leaving us with the sixty-three documents currently in dispute.

alternative, for an *in camera* review. D.D.C. ECF No. 30. That motion was supported by extensive briefing by the retirees as to their litigation need for the documents in question, why Treasury had failed to demonstrate that the presidential communications privilege applied to those documents, and why, under the governing case law, their need for the materials was sufficient to overcome the privilege. On the last point, Respondents particularly asserted that they had a "specific need for a narrow universe of highly relevant admissible documents that cannot be obtained elsewhere." *Id*. at 28.

In response, Treasury offered just three paragraphs on why the retirees had failed to make the "'focused demonstration of need'" for the documents, as required under *In re Sealed* Case, 121 F.3d 729 (D.C. Cir. 1997). D.D.C. ECF No. 35 at 23-24 (quoting *In re Sealed Case*, 121 F.3d at 746). Notably, Treasury did not assert that the information in question was available from other means. *Id*. It was only after Respondents filed their motion to compel that Treasury offered the declaration of Jennifer M. O'Connor, a former Deputy Counsel to President Obama, in support of its assertion of the presidential communication privilege claim over sixty-three documents. JA195. Ms. O'Connor's declaration does not purport to be made on President Obama's behalf, but on behalf of the "Office of the President," JA196, "based on [her] review of those documents." *Id*.

In June 2016, the District Court entered a minute order requiring Treasury to submit for *in camera* review a random selection of the documents at issue, "[i]n order to better evaluate" Treasury's claims of privilege. JA7-8. While that initial *in camera* review led the District Court to conclude that Treasury had failed to provide sufficient information to support many of its privilege claims, the District Court nonetheless allowed Treasury the opportunity to further supplement its privilege assertions. JA8. In that regard, it ordered Treasury to provide for *in camera* review *all* of the documents it wished to continue to withhold, along with an *ex parte* submission clearly articulating why each document, or document portion, was protected by the privilege asserted. *Id.*

In December 2016, after reviewing the withheld documents and Treasury's *ex parte* submission *in camera*, the District Court concluded that, despite having "had ample opportunities to provide sufficient detail to enable the Court to assess its deliberative process privilege claims," Treasury had "miserably failed to do so" and had "essentially wasted this Court's precious and limited time." JA180. The District Court accordingly ordered Treasury "to produce to Respondents all of the documents over which it asserted the deliberative process in isolation." JA146-7. "Noting that Treasury had withdrawn nearly 75% of its privilege assertions when first ordered to make an *in camera* submission," Treasury was ordered to revise its privilege log and submit an updated *in camera* production containing only the

remaining documents withheld under the presidential communications privilege, the attorney-client privilege, or the work-product doctrine. JA147.

On January 10, 2017, Treasury provided to the District Court for *in camera* inspection copies of the remaining documents at issue, accompanied by *ex parte* justifications. JA167. Treasury also provided to the retirees a revised privilege log consisting of redacted versions of the justification sheets provided to the District Court. *See* JA59-144.

3. The District Court's Orders Requiring Treasury to Produce the Documents Over which Treasury Asserted the Presidential Communications Privilege

On April 13, 2017, the District Court granted in part and denied in part the remaining portion of Respondents' motion to compel. JA165-66. After finding that the presidential communications privilege applied to the 63 documents at issue here, the District Court then applied the "needs" analysis outlined in *In re Sealed Case*, 121 F.3d at 754 and *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977). JA154-55. Noting that Treasury failed to "substantively engage" in that analysis and did not "attempt to distinguish the cases upon which Respondents rely," the District Court found that, "for substantially the same reasons advanced by Respondents," Respondents had made "'a preliminary showing of necessity for information that is not merely demonstrably relevant but indeed substantially material to their case.'" JA155 (quoting *Dellums*, 561 F.2d at 249). Additionally,

the District Court agreed that the requested documents contained information "unavailable through any other means" and found that Treasury "d[id] not challenge this assertion in its opposition [brief]." *Id*. (citing D.D.C. ECF No. 35 at 24).

On April 28, 2017, Treasury moved for a stay pending appeal, in order to allow it additional time "to consider[] whether to appeal" the District Court April 13, 2017 order. D.D.C. ECF No. 46-1 at 1. The District Court held, on May 16, 2017, a hearing on Treasury's motion to stay, during which the District Court noted "some very serious concerns about whether the government [has been] proceeding in good faith or not." JA40 at 4:10-11. During the hearing, Treasury expressed a desire to file a motion for reconsideration so the District Court could conduct still another *in camera* review of the 63 documents and determine whether the all portions of the documents (as opposed to just parts) were sufficiently relevant to the retirees' case to warrant production. As Treasury's counsel stated, "nothing is supposed to go out under the presidential communications privilege . . . unless it's determined to be relevant to that particular case, and so, frankly, what we should have asked for was reconsideration so Your Honor could have gone through the documents" to limit the disclosure to just relevant parts of the disputed materials. JA46 at 10:4-8. The District Court agreed to allow Treasury's motion for reconsideration, inviting it to explain what else, if anything, Treasury believed

should have been included in the District Court's analysis. *See* JA45 (Tr. of May 16, 2017 hearing, at 9:16-17 (asking of government counsel, "Is there something else the Court should have addressed in its opinion to demonstrate need?")); JA47 (Tr. of May 16, 2017 hearing, at 11:5-6 ("if I'm missing something there, then I want you to tell me what I'm missing")).

Later that same day, the District Court issued a Minute Order establishing a briefing schedule for Treasury's motion for reconsideration. In that order, the District Court noted that the parties should address, *inter alia*, "(1) whether respondents have adequately made a 'showing of need' for documents otherwise protected under the presidential-communications privilege; and (2) the standard by which the Court should determine, during an *in camera* inspection, whether the documents at issue are 'relevant' to respondents' case." JA9.

In its reconsideration briefing, Treasury seemed to concede as a legal matter that, in civil cases, the presidential communications privilege can be overcome where a litigant has made "'at least a preliminary showing of necessity for information,'" to the effect that the information is "'not merely demonstrably relevant but indeed substantially material to their case.'" *See* D.D.C. ECF No. 50-1 at 10 (quoting *Dellums*, 561 F.2d at 249). And Treasury did *not* seek to revisit the District Court's conclusion that Treasury had conceded to be unavailable through any other means the information the retirees seek here. Instead,

Treasury's principal argument for reconsideration was a belated attempt to distinguish *Dellums*, *see id*. at 7-9, along with a cursory argument that the retirees, as an evidentiary matter, had failed to make the requisite showing of need under *Dellums* and *In re Sealed Case*. *Id*. at 9-10. In response, the retirees summarized their previous needs showing, now in light of Treasury's revised privilege log, and articulated why each discrete group of documents was likely to contain information of substantial relevance to the *Black v. PBGC* litigation that was unavailable from other sources. D.D.C. ECF No. 51 at 16-28.

On June 7, 2017, the District Court issued an order on Treasury's reconsideration motion, in which Judge Sullivan noted the "considerable judicial resources" the District Court had expended in the five years since Treasury's initiation of the case, including its "*in camera* review of hundreds of documents across multiple rounds of briefing." JA34. The District Court further noted that its *in camera* review had "determined that only 21 of the 63 documents" implicating presidential privilege were "unique" – with the remaining 42 documents being "either duplicate copies or drafts of those 21 documents." JA35 n.1. Of those 21 unique documents, only two were ever actually reviewed by President Obama: a draft presidential speech, and a personal request for information by him. JA148 & n.1. "The vast bulk of the documents withheld from production," the District Court found, consisted of communications among

staffers. JA149.

After "careful consideration of Treasury's motion for reconsideration, the response and the reply thereto, the parties' previous submissions, a supplemental *in camera* review of the 63 documents at issue, and the entire record," JA35, the District Court upheld its earlier finding that the retirees' litigation need was sufficient to overcome Treasury's assertion of the presidential communications privilege, but granted in part Treasury's motion to reconsider both by restricting Treasury's production obligations to those "portions of the documents at issue that relate to (1) General Motors, (2) Delphi Corporation, or (3) the [PBGC]," and by restricting public access to the documents whereby their production could occur only "pursuant to a protective order agreed to by the parties." JA10. Respondents, in compliance with the District Court's directive, subsequently proposed protective-order terms to Treasury, under which, from the retirees' side, only the retirees' attorneys (and associated legal staff) – not even the retirees themselves – would review and use the documents at issue, the attorneys would file related court submissions under seal, and the attorneys would forever keep the documents and their contents confidential should Treasury win its appeal. *See* Addendum to Appellees' Response to Emergency Motion to Stay ("RA") at 59-64. In response, Treasury said it would negotiate the terms of a protective order only if this Court denied a stay pending appeal. *See* RA65.

C. Proceedings in this Court

On July 17, 2017, Treasury filed an emergency stay motion with this Court. The Court granted an administrative stay and directed Treasury to provide the 63 documents for the Court's *in camera* review. The Court, citing *Dellums*, 561 F.2d at 247-48, also directed Treasury to "explicate whether the Treasury Department is asserting the privilege (1) on behalf of the Office of the President, (2) on behalf of former President Barack Obama, or (3) on some other ground." D.C. Cir. Order (D.C. Cir. #1686024, July 26, 2017). Treasury responded to the Court's order with a letter from its counsel asserting that the privilege continues to be "on behalf of the Office of the President." Letter from Abby C. Wright to Mark Langer at 1 (D.C. Cir. #1686682, Aug. 1, 2017).

The retirees opposed Treasury's motion for an emergency stay, arguing it had no likelihood of success on the merits of its appeal, and further noting that there were significant questions as to whether the Court had jurisdiction, since the discovery order was neither final nor subject to the collateral order doctrine. Based on these same arguments, the retirees moved for summary affirmance of the District Court's order. After expedited briefing, this Court denied the retirees' motion for summary affirmance and granted Treasury's request for an emergency stay, holding that the merits of the case were not so clear as to warrant summary action and that Treasury had satisfied the criteria for a stay; it also ordered

expedited briefing on the merits and prompt scheduling of oral argument. D.C. Cir. Order at 1-2 (D.C. Cir. #1688366, Aug. 11, 2017).

SUMMARY OF ARGUMENT

Treasury significantly miscomprehends this Court's precedents regarding the presidential communications privilege. For example, it ignores the Court's repeated warnings that the privilege "should be narrowly construed," given that, like all "'exceptions to the demand for every man's evidence,'" its application is "'in derogation of the search for truth.'" *In re Sealed Case*, 121 F.3d 729, 749 (D.C. Cir. 1997) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974) additional citations omitted)); *accord Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1116 (D.C. Cir. 2004). It likewise fails to acknowledge that this narrow construction is "particularly important" where, like here, the privilege has been asserted over the communications of presidential advisors who also "perform other functions in addition to advising the President," *In re Sealed Case*, 121 F.3d at 752, or that the demands of the privilege "become more attenuated the further away the advisers are from the President operationally." *Judicial Watch*, 365 F.3d at 1115.

Treasury's assertion that the District Court misapplied *In re Sealed Case* and *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977), similarly reflects a failure to grapple seriously with the governing law. In *In re Sealed Case*, the Court held that

the privilege "is, at all times, a qualified one," such that covered documents "will remain available upon a sufficient showing of need," *In re Sealed Case*, 121 F.3d at 751, and articulated two components of a need showing, first, a demonstration by the party seeking to overcome the privilege "that each discrete group of the subpoenaed materials likely contains important evidence; and second that this evidence is not available with due diligence elsewhere." *Id.* at 754. In *Dellums*, the Court held "that an adequate showing of need in a civil trial would also defeat the privilege 'at least where, as here, the action is tantamount to a charge of civil conspiracy among high officers of government to deny a class of citizens their constitutional rights and where there has been sufficient evidentiary substantiation to avoid the inference that the demand reflects mere harassment.'" *In re Sealed Case*, 121 F.3d at 744 (quoting *Dellums*, 561 F.2d at 247). The manner in which Treasury attempts to distinguish *Dellums* is unpersuasive, especially given Treasury's failure to even mention the case during the initial briefing before the District Court, as well as the material similarities between *Dellums* and the retirees' suit against the PBGC.

Treasury's analysis also falters by failing to recognize that the interests in maintaining confidentiality of documents covered by the privilege are not the same in every case; there is instead a "balancing methodology," where "the public interests served by protecting the President's confidentiality in a particular

context," are weighed against the public interests that would be "further[ed] by requiring disclosure." *In re Sealed Case*, 121 F.3d at 753; *accord Dellums*, 561 F.2d at 246 (public's interest in maintaining confidentiality requires "particularized analysis" not "mechanistic formalism inherent in a claim of executive absolutism") (internal quotations omitted). Given the facts of this case, the public interest in maintaining confidentiality here is at its absolute nadir. And, contrary to Treasury's assertion, the retirees' subpoena does not implicate the separation of powers concerns presented in *Cheney v. U.S. District Court*, 542 U.S. 367, 381-82 (2004), as it was a narrow subpoena directed to Treasury solely, and not to the Office of the President or Vice-President.

Treasury's alternate argument, that the District Court procedurally failed to "conform to the requirements of *In re Sealed Case*," Treas. Br. at 13, rests on a distorted view of the proceedings below. Contrary to the situation presented in *In re Sealed Case*, where the district court simply failed to respond to arguments presented by the proponent of a subpoena, 121 F.3d at 736, here it was Treasury, not the District Court, that failed to "substantively engage" in the needs analysis, and did not "attempt to distinguish the cases upon which Respondents rely." JA155. Faced with the complete lack of engagement by Treasury, along with substantial briefing from the retirees that the information "may show pressure exerted by Treasury or the White House to terminate the Delphi Plan for

impermissible or political reasons, an issue at the core of the parties' dispute in the Michigan case," JA154-55, the District Court appropriately found, "for substantially the same reasons advanced by Respondents," that the retirees had demonstrated that the information sought was "'substantially material to their case.'" JA155 (quoting *Dellums*, 561F.2d at 249).

Because the District Court's orders were supported by detailed descriptions of the documents in question, *see* JA147-54, JA35 n.1, followed *in camera* review, and were accompanied by an explanation of the District Court's legal reasoning, its decision-making was precisely of the sort prescribed by the Court. *See In re Sealed Case*, 121 F.3d at 740. Indeed, by engaging in multiple rounds of *in camera* review, and then further refining its production order in response to Treasury's motion for reconsideration, the District Court went out of its way to accommodate Treasury's interests.

ARGUMENT

I. STANDARD OF REVIEW

Where a district court's decision on a matter of privilege rests on "factual determinations . . . appellate deference is the norm," *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110 (2009), and "[o]rdinarily, this [C]ourt will review a district court's ruling on a subpoena for the production of documentary evidence only for arbitrariness or abuse of discretion." *In re Sealed Case*, 121 F.3d 729, 740

(D.C. Cir. 1997). While deference is inappropriate if the decision under review "rests upon a misapprehension of the relevant legal standard or is unsupported by the record," an "absence of detailed findings" – where a district court has reviewed withheld documents *in camera* – does not preclude deference so long as the district court has provided some "explanation of its legal reasoning." *Id*. (internal citations omitted).

II. THE DISTRICT COURT APPLIED THE CORRECT LEGAL STANDARDS IN EVALUATING THE RETIREES' NEED FOR THE DOCUMENTS AT ISSUE

A. Under *Dellums* and *In re Sealed Case*, the Presidential Communications Privilege Is Narrow in the First Instance and Otherwise Can Be Overcome by a Showing of Need

1. The starting point is with the general contours of the presidential communications privilege. The presidential communications privilege may be invoked by the President "when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential." *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997). The privilege "should be narrowly construed," given that, like all "'exceptions to the demand for every man's evidence,'" its application is "'in derogation of the search for truth.'" *Id*. at 749 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("*Nixon*") (additional citations and internal quotation marks omitted). Further, because "openness in government has always been thought

crucial to ensuring that the people remain in control of their government," the arguments for applying a narrow construction of the privilege are "particularly strong in cases . . . where the public's ability to know how its government is being conducted is at stake." *Id*. Indeed, "[t]he very reason that presidential communications deserve special protection, namely the President's unique powers and profound responsibilities, is simultaneously the very reason why securing as much public knowledge of presidential actions as is consistent with the needs of governing is of paramount importance." *Id*.

The discretion to assert the privilege has been long recognized as belonging solely to the President, as opposed to other individuals in the Executive Branch. In 1807, during Aaron Burr's trial for treason, "President Jefferson asserted the privilege in an effort to avoid producing a letter that he had received form General Wilkinson, one of Burr's main accusers." *In re Sealed Case*, 121 F.3d at 738 (citing *United States v. Burr*, 25 F. Cas. 30, 37 (CC Va. 1807) (No. 14,692d)). "Although Burr was acquitted in his treason trial before there were proceedings on his subpoena, he was immediately put on trial again on misdemeanor charges and as a result sought production of another letter Wilkinson had sent to Jefferson." *Id*. (citation omitted). President Jefferson attempted to delegate to the prosecuting U.S. Attorney the ability to determine which portions of this second letter should be withheld, but Chief Justice Marshall (riding circuit) rejected that delegation,

ordering that the "letter be provided to Burr in its entirety, because 'the propriety of withholding [the letter] must be decided by [the President] himself.'" *Id*. at 739 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (CC Va. 1807) (No. 14,694)).

Because "the President's Article II powers and responsibilities" provide the "constitutional basis" of the privilege, and those responsibilities are assigned "to the President alone, arguably the privilege of confidentiality that derives from them also should be the President's alone." *Id*. at 748 (citing *Nixon*, 418 U.S. at 705 & n.16). However, in *In re Sealed Case*, this Court indicated that the privilege can extend, in some cases, "to the communications of *presidential advisers* not directly involving the President." *Id*. at 749 (emphasis added). Still, that extension represents the outermost boundary of the privilege, and this Court has cautioned against extending it to that degree, since extending the privilege to such communications "inevitably creates the risk that a broad array of materials in many areas of the executive branch will become sequestered from public view." *Id*. (internal quotation marks and citation omitted); *see also id*. at 752 (warning that extension of the privilege to presidential advisers, "unless carefully circumscribed to accomplish the purposes of the privilege, could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President"). Accordingly, "[i]n order to limit this risk, the presidential communications privilege should be construed as

narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected." *Id*.

The narrow construction of the privilege is "particularly important in regard to those officials who exercise substantial independent authority or perform other functions in addition to advising the President, and thus are subject to FOIA and other open government statutes." *Id*. (internal quotation marks and citation omitted). Because the privilege "should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President," the government – in cases where the it seeks to shield "particular communications of these 'dual hat' presidential advisers" – "bears the burden of proving that the communications occurred in conjunction with the process of advising the President." *Id*.

Moreover, in cases involving a President's advisers, "there is, in effect a hierarchy of presidential advisers such that the demands of the privilege become more attenuated the further away the advisers are from the President operationally." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004). And regardless of the proximity to the President, "[a]n advisor to the President has no guarantee of confidentiality. His advice may be disclosed by the President or a successor." *Dellums v. Powell*, 561 F.2d 242, 246 (D.C. Cir. 1977).

2. As this Court emphasized in *In re Sealed Case*, the presidential communications privilege "is, at all times, a qualified one, so that an expansion to cover communications of presidential advisers which do not directly involve the President does not mean that these communications will become permanently shielded; they will remain available upon a sufficient showing of need." *In re Sealed Case*, 121 F.3d at 751. Indeed, even in cases where confidential communications directly involving the President are it issue (where the President's confidentiality concerns are at their apex), "the legitimate needs of the judicial process may outweigh Presidential privilege," making it "necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." *United States v. Nixon*, 418 U.S. 683, 707 (1974).

The "needs" standard articulated in *In re Sealed Case*, a criminal case, consists of two components: first, a demonstration by the party seeking to overcome the privilege "that each discrete group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d at 754. In the context of civil litigation, the Court has stated the standard in largely similar terms. *See Dellums*, 561 F.2d. at 249 (requiring a "preliminary showing of necessity for information . . . that is not merely demonstrably relevant but indeed substantially material" to the litigation).

"If a court believes that an adequate showing of need has been demonstrated, it should then proceed to review the documents *in camera* to excise non-relevant material. The remaining relevant material should be released." *In re Sealed Case*, 121 F. 3d at 745. This *in camera* review "operates on the presumption that some privileged materials will probably be released" and is designed "simply to ensure that privileged materials that would not be of use to the subpoena proponent are not released." *Id*. at 759.

Thus, under *Dellums* and *In re Sealed Case*, the presidential communications privilege is narrow, is only sparingly available to presidential advisers (as opposed to the President himself), and in all instances can be overcome by a showing of substantial need for important information that cannot be obtained elsewhere. As we show next, the District Court faithfully applied those rules in this instance.

B. The District Court Correctly Applied the Standards Articulated in *Dellums* and *In re Sealed Case*

In finding that the presidential communications privilege applied to the documents withheld by Treasury, and in holding that the retirees' need for the relevant portions of the documents was sufficient to overcome the privilege, the District Court overtly applied the standards articulated in *Dellums* and *In re Sealed Case*. JA147-55 (citing *Dellums* and *In re Sealed Case*); JA34-36 (noting earlier decision). Treasury nevertheless asserts that the District Court applied the "wrong

legal standard," in concluding that the retirees' need for the documents at issue "outweighed the significant constitutional interests protected by the presidential communications privilege." Treas. Br. 1. Treasury's arguments on this score fundamentally misapprehend the controlling law and egregiously understate the depth and detail of the District Court's analysis.

1. Treasury, first of all, puts undue weight on the fact that the retirees' subpoena was issued in connection with civil litigation, suggesting that a civil litigant's burden must always be higher than that demonstrated in the criminal context, regardless of the other factors present in the case. *See, e.g.*, *id.* at 12-13, 17-19. This is decidedly not the law. Evaluating need in the context of the presidential communications privilege requires that courts employ a "balancing methodology," weighing on the one hand "the public interests served by protecting the President's confidentiality in a particular context," against the public interests that would be "further[ed] by requiring disclosure." *In re Sealed Case*, 121 F.3d at 753.

In terms of assessing the public's interest in disclosure, while "[t]he need for information for use in civil cases … does not share the urgency or significance" of a criminal subpoena, the Supreme Court has cautioned that, even in routine civil cases, a litigant's need for information is "far from negligible." *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 384 (2004). Consequently, both this Court and

others have "held that the presidential communications privilege could be overcome by the evidentiary demands of a civil trial." *In re Sealed Case*, 121 F.3d at 744 (citing *Dellums*, 561 F.2d at 247, and *Sun Oil Co. v. United States*, 514 F.2d 1020, 1024 (Ct. Cl. 1975)).

In fact, even in the context of civil litigation under the Freedom of Information Act, where there was no showing of litigation need, this Court has ordered the production of Department of Justice documents generated in the course of preparing pardon recommendations for the President, noting that "[c]ourts have long been hesitant to extend the presidential communications privilege" too far, "for ours is a democratic form of government where the public's right to know how its government is conducting its business has long been an enduring and cherished value." *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1121 (D.C. Cir. 2004) (citing *In re Sealed Case*, 121 F.3d at 749). And this Court has also held that in some civil actions there can be "a strong constitutional value in the need for disclosure" where "high officers of government" are alleged to have interfered with the "enforcement of constitutional rights." *Dellums*, 561 F.2d at 247.

In this case, then, the civil nature of the controversy is, contrary to Treasury's assertions, no barrier to the retirees overcoming the presidential communications privilege. That conclusion is all the more persuasive given that the underlying civil case to which the disputed documents are pertinent concerns

ERISA and the Constitution. ERISA was passed "with the overwhelming purpose of protecting the legitimate expectations . . . of a measure of retirement security at the end of many years of dedicated service." *Page v. PBGC*, 968 F.2d 1310, 1317 (D.C. Cir. 1992) (Ginsburg, J.). The retirees' suit alleges that Treasury officials improperly interfered with those expectations for the sake of political expediency, in violation not only of ERISA, but also (as stated in Count Three of their complaint) in violation of the Constitution, implicating a "need for disclosure" of similar character to that presented in *Dellums*. *Dellums*, 561 F.2d at 247.

Treasury also misguidedly asserts that *Cheney* necessitated the District Court subject the retirees to an especially stringent needs showing, greater than anything recognized in *Dellums* or *In re Sealed Case*. *See* Treas. Br. 18. *Cheney* was a unique case. While, to be sure, it was a civil discovery dispute, it also presented the "important factor" of discovery requests "directed to the Vice President and other senior Government officials." 542 U.S. at 385. As a result, the case presented "separation-of-powers considerations," *id*. at 382, that might otherwise not have been present had the Vice President not been "a party in the case" and "the subject[] of the discovery orders." *Id*. at 381. Here, by contrast, the subpoena in question was directed to the Department of Treasury, not to the President or Vice-President themselves. *See infra* pp. 43-44 (noting also the significance of who here asserted the privilege). Likewise, *Cheney* noted that the

"specificity of the subpoena" in question can "serve[] as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Id*. at 387. In this case, the District Court, again, determined that the subpoena in question was "narrow." JA255. Finally, and most important, *Cheney* did not identify a contrary test for evaluating claims of privilege, and Treasury never proposes one, let alone explains why an alternative standard would have yielded a different result here.

2. Along the way to inviting (and wrongly so) the Court to adopt an almost categorical standard under which the presidential communications privilege operates in civil cases to shield the government from disclosure of its documents, Treasury overplays the public interest in confidentiality. In Treasury's view, there are no gradations in the President's need for confidentiality based on a case's setting, since the privilege is (in its view) so "'fundamental to the operation of Government, and inextricably rooted in the separation of powers under the Constitution.'" Treas. Br. 16 (quoting *Nixon*, 418 U.S. at 708). In reality, the "balancing methodology" at play in both *Dellums* and *In re Sealed Case* requires (whether in a criminal or civil case) an assessment, in the particular circumstances, of both the public interest in protecting the President's confidentiality and the public interest furthered by disclosure. *In re Sealed Case*, 121 F.3d at 753; *see also Dellums*, 561 F.2d at 246. Considering the very weak public interest in

preserving the confidentiality of the particular documents at issue here, the District Court cannot be faulted for having ultimately found it subordinate to the public interest in disclosure.

The public has little interest in maintaining the confidentiality of the sixty-three documents here at issue. "The vast bulk of the documents" (JA149) were either draft memoranda from Treasury staffers to Dr. Lawrence Summers or email conversations among those staffers concerning advice to be provided to the President.[7] JA148-49 (noting that sixty of the sixty-three documents at issue fell into these two categories). Because these sixty documents did not directly involve President Obama, the presidential communications privilege must be "carefully circumscribed" as to them. *In re Sealed Case,* 121 F.3d at 752. Given the "hierarchy of presidential advisers," the "demands of the privilege" were here "attenuated," because of the operational distance of these particular advisors from the President. *Judicial Watch*, 365 F.3d at 1115.

The public's interest in maintaining the confidentiality of these documents is further diminished in light of their subject matter. While the public interest in maintaining confidentiality is at its highest where there is "a claim of need to

[7] As the District Court observed, Dr. Summers wore multiple hats during this time period, serving as an Assistant to the President for Economic Policy, co-chair of the Auto Task Force, and Director of the National Economic Council. *See* JA150.

protect military, diplomatic, or sensitive national security secrets," the interest is much less acute "when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations." *Nixon*, 418 U.S. at 706. Here, none of the documents implicate national security or diplomatic concerns; rather, as the District Court observed following its *in camera* reviews, "all of the withheld documents 'relate to the President's decision as to how the United States should address the financial distress of several of its large automobile corporations and protect the country from the potential consequences of their bankruptcy.'" JA150 (quoting Decl. of J. O'Connor, ¶ 7). Also of significance, this Court has distinguished between documents generated in connection with a "quintessential and non-delegable Presidential power" on the one hand, versus those that can be executed "without the President's direct involvement" on the other, *In re Sealed Case*, 121 F.3d at 752, noting that there is some "assurance" that the former category of documents "are intimately connected" to "presidential decisionmaking." *Id*. at 753. Treasury has not identified any Article II powers or decision-making implicated in these documents.

The public's "interest in maintaining the confidentiality" of a subject is also "substantially diminishe[d]" where public testimony has already been offered on the subject. *Nixon v. Sirica*, 487 F.2d 700, 718 (D.C. Cir. 1973) ("*Sirica*"). Here, not only have there been "'numerous congressional hearing at which the Delphi

Salaried Plan and its termination have been discussed'" (JA259), but, as Treasury's counsel noted during one hearing before the District Court, "[o]ne of the fellows who was on the group at Treasury that worked on the restructuring of GM wrote a book about it." JA48 at 12:10-11 (referring to Steven Rattner).

Still further, the Supreme Court has made clear that the passage of time can further diminish the concern of impairing candid communications with Presidential advisors, as "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding" and such expectations have "always been limited and subject to erosion over time after an administration leaves office." *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 451 (1977) ("*GSA*"). Here, again, the documents are more than eight years old. In *GSA*, the Court noted as relevant the minimal level of the proposed intrusion, finding there that the "very limited intrusion" of screening by archivists, *id*., coupled with "the restriction of public access" provided in connection with the subsequent disclosure, diminished any the concerns for maintaining confidentiality of the materials in question. *Id*. at 452. Here too, the level of intrusion is minimal, as the District Court's orders would only require production of the documents pursuant to an agreed-upon protective order, such that the general public would not have access to the documents. JA10.

Nor does *Dellums* assist Treasury in finding a substantial interest in confidentiality. In *Dellums*, this Court emphasized that "the significance of the

assertion by a former president is diminished when the succeeding president does not assert that the document is of the kind whose nondisclosure is necessary to the protection of the presidential office and its ongoing operation." *Dellums*, 561 F.2d at 248. Treasury asserts that the public interest in preserving confidentiality is supposedly greater here than in *Dellums* because the "Office of the President" invoked the privilege in 2015, and government attorneys "continue[] to defend its assertion in this litigation on behalf of the Office of the President." Treas. Br. 20. But the basis of the privilege is the President's constitutional powers that are assigned to him alone, *see In re Sealed Case*, 121 F. 3d at 748 (citing *Nixon*, 418 U.S. at 705 & n.16), and they have long been considered non-delegable. *Id*. at 739 (citing *United States v. Burr*, 25 F. Cas. 187, 192 (CC Va. 1807)). Leaving aside the question of whether someone in the government other than the President himself is constitutionally qualified to invoke the privilege on behalf of the "Office of the President" in the first place, *see, e.g., Judicial Watch*, 365 F.3d at 1114 ("the issue of whether a President must *personally* invoke the privilege remains an open question") (emphasis added), the invocation of the privilege by someone other than the President cannot carry the same constitutional weight as the invocations in *Dellums*, *In re Sealed Case*, *Nixon*, *GSA*, and *Sirica*, all of which were expressly

made on behalf of an actual President, not on behalf of the institutional "Office of the President."[8]

The Court's statement in *Dellums* that the privilege "inher[es] in the institution of the Presidency," rather than the President as an individual, *Dellums*, 561 F.2d at 247 n.14, was not a holding that the privilege belonged to the government generally, or even the Office of the President more specifically. Instead, the Court was explaining why a former President's invocation of the privilege is entitled to less weight than that of an incumbent President; indeed, the Court went on to note the primacy of the President himself in the process, emphasizing that it is "the new President . . . who has the primary, if not the exclusive, responsibility of deciding when presidential privilege must be claimed," *id*. at 247, and that the privilege "must be claimed by the president or an official authorized to speak for the president." *Id*. at 248. "The very reason that presidential communications deserve special protection, namely *the President's* unique powers and profound responsibilities," *In re Sealed Case*, 121 F.3d at 749 (emphasis added), mitigates strongly against assigning much weight to the

[8] *See In re Sealed Case*, 121 F.3d at 744 n.16 (noting that in *Nixon*, *Sirica*, and *GSA* "President Nixon personally asserted" the privilege, and that in the case before it, an affidavit indicated that "President Clinton has done so here"); *Dellums*, 561 F.2d at 243 (noting that former President Nixon was personally asserting the privilege).

unattributed assertion of the privilege here by "government," on behalf of the "Office of the President." Letter from Abby C. Wright to Mark Langer at 1 (D.C. Cir. #1686682, Aug. 1, 2017).

3. Treasury's assertion that the District Court's analysis failed to comply with the substantive and procedural requirements of, in particular, *In re Sealed Case* is without merit. *See* Treas. Br. 20-23. In *In re Sealed Case*, a grand jury investigating a former Secretary of Agriculture issued to the White House Counsel a "broad" subpoena for documents created by the White House Counsel, but never viewed by the President. *In re Sealed Case*, 121 F.3d at 734-35. After the White House withheld 84 documents on the basis of "executive/deliberative privilege," *id*. at 735, the Office of Independent Counsel (sometimes "OIC") brought a motion to compel the withheld documents, asserting that: the presidential communications privilege should not apply because none of the documents directly involved the President; even if the privilege did apply, the White House had waived the privilege through its conduct; and the grand jury's need for the documents was sufficient to overcome the privilege given the circumstances of the case. *Id*. at 736. After reviewing the documents *in camera*, the district court denied the motion to compel, without providing detailed findings of the *in camera* review or an explanation of its legal analysis. *Id*.

On review, this Court noted that it would ordinarily review a district court's ruling only for "arbitrariness or abuse of discretion." *Id*. at 740. The Court further noted that the district court's failure to provide "detailed findings would not," on its own, preclude the application of deference in light of the district court's *in camera* review. *Id*. However, the Court declined to accord the usual deference to the district court's ruling because, in denying the motion to compel, the district court failed to "address the OIC's claim that the White House had waived its privileges," to "analyze whether the presidential communications privilege applies to documents not seen by the President," or to explain "why the OIC's demonstration of need was deficient." *Id*. The combination of the district court's failure "to make factual findings" along with its failure "to provide any explanation of its legal reasoning," led the Court to review *de novo* the district court's denial of the motion to compel. *Id*.

The differences between this case and the one confronting the Court in *In re Sealed Case* are stark. Unlike the situation presented in *In re Sealed Case*, here the District Court addressed all of Treasury's arguments (which were minimal) before ordering production, and provided the parties with detailed factual findings about the documents at issue and the basis of its reasoning, which rested on a lengthy record. Again, the District Court ordered production based upon an extensive record compiled over five years, consisting of: twenty-three substantive briefs,

scores of exhibits, two hearings, three *in camera* reviews, supplemental *ex parte* privilege justifications by Treasury; and required Judge Sullivan to issue three memorandum opinions.

In those opinions, the District Court provided detailed factual findings regarding both the four categories of withheld documents, as well as the individual documents contained in each category. For example, in its April 13, 2017 opinion, the District Court scrutinized over eight pages, JA147-54, the four "discrete group[s]" of subpoenaed materials, *In re Sealed Case*, 121 F.3d at 754, noting which documents comprised each of the groups. In its June 7, 2017 order, the District Court offered a further demonstration of its detailed review, noting that "through its *in camera* review, the Court [] determined that only 21 of the 63 documents are 'unique' – the remaining 42 documents are either duplicate copies or drafts of those 21 documents." JA35 n.1. These findings, coming on the heels of three *in camera* reviews, are precisely the sort of detailed findings worthy of deference under the Court's precedent. *In re Sealed Case*, 121 F. 3d at 740.

Treasury's claim that the District Court failed to provide, consistent with *In re Sealed Case*, a sufficient explanation of is reasoning must also fail. The District Court's express incorporation of the retirees' needs analysis, JA155, provided ample explanation of the District Court's reasoning, and that format and approach was entirely appropriate given the disparity of the parties' showings. By the time

of issuance of the April 2017 order, the District Court had "expended considerable judicial resources in evaluating Treasury's various claims of privilege," JA34, the vast majority of which were found to have been "miserably" deficient, even after Treasury was allowed multiple opportunities to cure. JA180.

Moreover, in contrast to the extensive briefing from Respondents as to the relevance of these documents in general, *see* D.D.C. ECF No. 30 at 12-16, and why Respondents' need for the documents overcame any assertion of the presidential communications privilege, *id*. at 25-32, Treasury offered just three paragraphs in opposition, D.D.C. ECF No. 35 at 23-24, and even those paragraphs failed to "substantively engage in the needs analysis or attempt to distinguish the cases upon which Respondents rel[ied.]" JA155. Given the District Court's previous determination that Treasury had "essentially wasted [the District Court's] precious and limited time," JA180, the District Court's decision not to expend still more judicial resources rearticulating what the retirees had already demonstrated was entirely understandable and proper.

Going even a step further, the retirees then offered an additional summary of the points in the record supporting the District Court's decision in their opposition to Treasury's motion for reconsideration (D.D.C. ECF No. 51). In that submission, the retirees showed, again, why each of the four categories of withheld documents was likely to contain information of substantial relevance to the central issue in

their case in the Michigan Court against the PBGC – namely, whether the PBGC's termination of the Plan in July 2009 was necessary under the criteria in 29 U.S.C. § 1342(c). *See* D.D.C. ECF No. 51 at 16-28.

For example, Respondents noted that the vast majority of withheld documents (53 of 63), were iterations of thirteen memoranda from Treasury staffers to Dr. Summers, seven of which are iterations of an "April Memo" regarding "the Delphi Corporation," some of which were described in Treasury's original privilege log as discussing "Delphi's liquidity issues and potential consequences of Delphi shutdown." *Id*. at 24.[9] Respondents noted that a memorandum from April 2009 addressing Treasury's views on the "potential consequences of Delphi shutdown" is highly relevant to the § 1342(c) inquiry, as it necessarily relates to the value and leverage the PBGC had vis-à-vis GM reassumption given its liens and claims on Delphi assets, which could result in a Delphi shutdown, and might also provide insight into whether Treasury was able to persuade the PBGC to abandon its advocacy of a GM reassumption. *Id*. Respondents went on to note additional factors demonstrating their need for the draft memoranda, *id*. at 25-26, the email chains, *id*. at 26-27, the draft speech, *id*. at

[9] These seven documents, assigned Nos. 84, 275, 849, 856, 859, 860, 863 by Treasury, appear in Treasury's revised privilege log at JA68, 70, 122-27. The references to Treasury's original privilege log appear at JA220-22.

27-28, and the handwritten request from President Obama specifically referencing the Delphi Salaried Plan. *Id*. at 28. Treasury has *never* offered a refutation of this relevance analysis, either in the District Court below, or here in this Court. *In re Sealed Case* requires only that a district court respond to a party's arguments and make clear why a particular argument has been rejected. *In re Sealed Case*, 121 F.3d at 740.

Nor was the District Court under any obligation to engage in greater fact-finding to determine whether the materials were available through other means. Again, the Court in *In re Sealed Case* found the district court's legal analysis there lacking because it failed to respond to several substantial legal arguments posed by the Office of Independent Counsel. Here, by contrast, Treasury did not contest the issue below *at all*. *See* JA155 ("Respondents represent that the materials are unavailable through any other means . . . and Treasury does not challenge this assertion in its opposition" (citing D.D.C. ECF No. 35, at 24)); *see also* D.D.C. ECF No. 50 at 6-11 (in moving for reconsideration, failing anywhere to argue that the retirees had not made a sufficient showing of the material in question being unavailable through other means). Having waived the point below, Treasury should not be able to now raise the argument on appeal.

In any event, the retirees' assertion that this information was unavailable through other means, and the Court's acceptance of that assertion, was plainly

correct. As this Court has observed, "there will be instances where such privileged evidence will be particularly useful" and where "the subpoena proponent will be able to easily explain why there is no equivalent to evidence likely contained in the subpoenaed materials." *In re Sealed Case*, 121 F. 3d at 755. This is one of those cases.

As the record demonstrates, by the summer of 2009, the key players viewed the internal views of Treasury to be critical to whether Delphi's various plans (including the Salaried Plan) would need to be terminated. *See, e.g.*, JA305 (SIGTARP report noting PBGC official's statement that when it came to GM reassumption of Delphi pension plans, "I knew what GM's position was. It didn't have to do anything with GM. If there was any possibility that it was going to happen, it was going to come from Treasury. It would be Treasury folks because they had the right of refusal and could dictate what was going to happen"); *id*. (SIGTARP report quoting Delphi's then-CFO John Sheehan as saying "GM wasn't in a position to dictate. Harry [Wilson] and Matt [Feldman] [*i.e.*, members of the Auto task Force] were the decision makers and the drivers on how this would all occur – in my view."). With the retirees having amply demonstrated the obvious point that information from Treasury was of unique importance to their case, and with Treasury having failed, on multiple occasions, to dispute the point, the

District Court's determination of the retirees needing the material from *these* sources was entirely appropriate.

CONCLUSION

The Court should affirm the District Court's orders requiring disclosure of the relevant portions of the sixty-three documents that Treasury has withheld under the presidential communications privilege.

Respectfully submitted,

/s/ Anthony F. Shelley
Anthony F. Shelley
Timothy P. O'Toole
Michael N. Khalil
Miller & Chevalier Chartered
900 Sixteenth St. NW
Washington, DC 20006
Telephone: (202) 626-5800
Facsimile: (202) 626-5801
Email: ashelley@milchev.com
Email: totoole@milchev.com
Email: mkhalil@milchev.com

September 20, 2017

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September 20, 2017
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/s/ Anthony F. Shelley
Anthony F. Shelley

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2017, I electronically filed the foregoing **BRIEF OF APPELLEES** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Mark B. Stern
Abby C. Wright
Samantha L. Chaifetz
Adam Jed
U.S. Dept. of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530
Email: mark.stern@usdoj.gov
Email: abby.wright@usdoj.gov
Email: samantha.chaifetz@usdoj.gov
Email: adam.jed@usdoj.gov

/s/ Anthony F. Shelley