[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 RETIREE ASSOCIATION,

Respondents-Appellees.

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

REPLY BRIEF FOR APPELLANT

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INTRODUCTION AND SUMMARY

At issue are sixty-three documents that the district court correctly held are covered by the presidential communications privilege. The question before the Court is whether the district court erred in holding that respondents had overcome the presidential communications privilege. As we showed in our opening brief, the district court failed to conduct even a minimal inquiry that might satisfy the standards established by this Court in *In re Sealed Case*, much less the heightened standard appropriately applied in civil cases. Under *In re Sealed Case*, the district court was required to determine "first, that each discrete group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere." 121 F.3d 729, 754 (D.C. Cir. 1997). Instead, the court simply declared, without elaboration or explanation, that it believed the privilege had been overcome with respect to all sixty-three documents "for substantially the same reasons advanced by Respondents." JA 155.

For their part, respondents do not attempt to explain their need for the privileged documents until page forty-seven of their fifty-two-page brief, and their discussion only demonstrates that the court's ruling cannot be sustained under any of this Court's precedents, or, indeed, under any of the variations that respondents propose. Respondents urge that the privileged documents may contain evidence that Treasury pressured the Pension Benefit Guaranty Corporation to terminate the pension plan for salaried employees of Delphi Corporation for impermissible political

reasons. As explained in our opening brief, respondents have no support for this contention. And, even assuming that this issue is, in fact, central to their underlying law suit, respondents offer no reason to conclude that the privileged documents are likely to contain evidence central to this claim or that this evidence is not available elsewhere. Respondents have obtained sweeping discovery from the Pension Benefit Guaranty Corporation and Treasury, in addition to a wealth of information from other sources. The Court's decision in *In re Sealed Case* makes clear that it is respondents' responsibility to "explain why evidence covered by the presidential privilege is still needed." 121 F.3d at 755. Respondents make no attempt to do so.

Rather than attempt to show that they have made the necessary "focused demonstration of need," *In re Sealed Case*, 121 F.3d at 746, respondents devote much of their brief to arguing that the Court should adopt a new standard for determining whether a party has overcome the presidential communications privilege, abandoning in large part a defense of the district court's erroneous application of this Court's decision in *Dellums*. In so doing, respondents ask the Court to engage in a standardless inquiry to evaluate the importance of the presidential privilege on a case-by-case basis, including document-specific predictions about the chilling effects on future advisers. Neither *In re Sealed Case*, nor any other decision applying the presidential communications privilege, offers a basis for such an ad hoc sliding-scale approach, which would fail to protect the public interest in candor among advisers that lies at the heart of the presidential communications privilege. Indeed, the only thing clear in

respondents' new mode of analysis is their belief in the unlikely proposition that the rationale for the privilege is "very weak" as applied to discussions concerning the response of the White House to a financial crisis in the automobile industry, with enormous potential consequences for the economy as a whole. Resp. Br. 39. Respondents cannot sidestep their obligations by attempting to shift the inquiry from their need to the importance of the privilege.

In sum, as we explain below, respondents' brief makes clear that they are unable to provide the focused demonstration of need required to overcome the presidential communications privilege even under the standard set forth in *In re Sealed Case*. Respondents instead urge this Court to embrace a new standard for determining when the presidential communications privilege has been overcome, but their proposal finds no support in this Court's precedents. Respondents do not, and cannot, successfully defend the district court's application of the wrong legal standard. Accordingly, we urge this Court to reverse, or, in the alternative, vacate and remand, the district court's production order.

ARGUMENT

A. Respondents Have Failed To Demonstrate That the Sixty-Three Documents at Issue Contain Evidence Important to Their Claim or That the Evidence Is Unavailable Elsewhere.

1. Respondents fundamentally misconceive the relevant inquiry on appeal. It is uncontested that the sixty-three documents at issue (some of which are duplicates, JA 35 n.1) fall within the scope of the presidential communications privilege. Respondents conceded the applicability of the privilege to a subset of the documents. JA 148-49 (addressing draft presidential speeches and personal requests for information from President Obama). And the district court rejected respondents' contentions regarding the remaining documents, noting that "all of the withheld documents 'relate to the President's decisions 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.'" JA 150 (quoting O'Connor Decl. ¶ 7, JA 196-97). Respondents have at no point challenged that ruling.

Respondents fail to come to grips with their burden in overcoming a valid assertion of the presidential communications privilege. As our opening brief explained, even in a criminal case, where the interest in obtaining privileged documents is greater than in civil litigation, "[a] party seeking to overcome a claim of presidential privilege must demonstrate: first, 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 729, 754 (D.C. Cir. 1997). With respect to the second requirement, "[e]fforts should first be made to determine whether sufficient evidence can be obtained elsewhere, and the subpoena's proponent should be prepared to detail these efforts and explain why evidence covered by the presidential privilege is still needed." *Id.* at 755. As this Court has admonished, "privileged presidential communications should not be treated as just another source of information[.]" *Ibid.*

The district court did not hold respondents to these standards, and its rulings do not explain how these standards have been satisfied with respect to any, much less all, of the requested documents. Respondents' suggestion that the district court actually engaged in careful analysis of the question whether respondents demonstrated a need for the documents sufficient to overcome the presidential communications privilege does not survive even cursory scrutiny. Respondents state that "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," and state that "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." Resp. Br. 47.

In the cited eight pages, the district court did, indeed, scrutinize the documents, but it did so to explain why each category of documents is covered by the presidential

communications privilege, a holding that is not disputed on appeal. The court did *not* address whether the privileged documents likely provide evidence important to respondents' claims against the Pension Benefit Guaranty Corporation. And because the court did not explain why the documents would likely provide important evidence, it also could not and did not explain why these materials in particular would add anything to respondents' abundant store of relevant evidence.

Elsewhere in their brief, respondents implicitly acknowledge that nothing in any of the district court's orders provides any explanation for the court's conclusion that respondents had satisfied the standards established by this Court. Respondents assert, instead, that it was sufficient that "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.'" Resp. Br. 29 (quoting JA 155 (in turn quoting *Dellums v. Powell*, 561 F.2d 242, 249 (1977))). But a court negating a valid assertion of the presidential communications privilege and ordering disclosure of protected documents has an obligation to explain its reasons for overcoming the privilege. *See In re Sealed Case,* 121 F.3d at 740. The court, which had the documents before it for *in camera* review, did not do so. And it offered absolutely no explanation for its statement that the requested documents "may show pressure exerted by Treasury or the White House to terminate the Delphi Plan for impermissible or political reasons." JA 154-55.

Respondents have obtained 70,000 pages of discovery from Treasury and more than one million pages of documents from the Pension Benefit Guaranty Corporation; they have also had access to depositions from a related bankruptcy proceeding, and to testimony at seven congressional hearings discussing the termination of the Delphi plan. At this point, it is incumbent on respondents to explain what evidence they have obtained in support of their legal claim and what any of the sixty-three documents at issue here might add—that is, to "explain why evidence covered by the presidential privilege is still needed." *In re Sealed Case,* 121 F.3d at 755. Instead, after obtaining massive discovery, respondents continue to offer no basis for their speculation and no indication that their demand for documents protected by the presidential communications privilege is anything more than a fishing expedition.[1]

[1] Respondents' cursory reference to the evidence they have compiled to date certainly provides no basis for obtaining the additional discovery they seek here. Declaring in a footnote that "Treasury is, frankly, unlearned as to the full discovery Respondents have obtained," respondents state that "[a]s just one example, in a memorandum dated a few days prior to the Auto Task Force's creation, Compass Advisors, one of the [Pension Benefit Guaranty Corporation]'s bankruptcy advisors, noted that the [Pension Benefit Guaranty Corporation] 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.'" Resp. Br. 10 n.4 (quoting JA 591). That document is without apparent relevance to respondents' theory of impermissible political influence. Respondents attempt to supply a connection by suggesting that it was not a "coincidence" that "the [Pension Benefit Guaranty Corporation] immediately changed its position dramatically upon the Auto Task Force's intervention," *id.,* a statement for which they provide no documentation

Respondents attempt to deal with this failure at the conclusion of their brief by citing the statement in *In re Sealed Case* that "there will be instances where . . . 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." Resp. Br. 51 (quoting *In re Sealed Case*, 121 F.3d at 755). Respondents then declare that "[t]his is one of those cases." *Ibid.*

Respondents cannot thus excuse themselves from meeting the governing standards. Their brief justification for this assertion in the concluding paragraph of their brief cites statements indicating the important role played by Treasury in the General Motors (GM) bankruptcy proceedings (a point that is presumably beyond dispute). Respondents note the statement of one official of the Pension Benefit Guaranty Corporation that "when it came to GM reassumption of Delphi pension plans . . . [i]f 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." Resp. Br. 51 (quoting JA 305). Even assuming the accuracy of this statement, it says nothing about an asserted need for documents protected by the presidential communications privilege based on the theory that they might reveal impermissible political influence.

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or elaboration. This conjecture is far from sufficient to demonstrate that the presidential communications are likely to contain evidence of central importance to their case.

2. As discussed, respondents have failed to overcome the presidential communications privilege, even assuming that their theory of impermissible political influence is actually relevant to the legal issue before the Michigan district court. Moreover, in crediting respondents' contention that the documents at issue are relevant to their case, the district court relied on findings it improperly attributed to the Michigan district court. *See* Resp. Br. 16 (quoting JA 254).

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, at 51, *Black v. Pension Benefit Guar. Corp.*, No. 09-cv-13616 (E.D. Mich.). The court's order was designed to deal with "count four" of respondents' complaint: that is, whether the Pension Benefit Guaranty Corporation could have met the criteria for a court order terminating the plan, if a judicial proceeding had occurred. As the court explained, "[s]uch a finding by the Court that termination was proper under 29 U.S.C. §1342(c) would moot the remainder of the complaint pertaining to the [Pension Benefit Guaranty Corporation] as it would be irrelevant whether ERISA[, the Employee Retirement Income Security Act of 1974,] and the Due Process Clause require that a hearing be held under 29 U.S.C. §1342(c) before termination of a plan (since with or without a hearing, termination would have been proper)." Dkt. No. 193, at 4.

After the Michigan judge granted discovery, the Pension Benefit Guaranty Corporation unsuccessfully moved for reconsideration. Dkt. No. 195, *Black v. Pension Benefit Guar. Corp.*, No. 09-cv-13616 (E.D. Mich.). Plaintiffs served the Pension Benefit Guaranty Corporation with a discovery request for "'all documents and things you received from . . . the Treasury Department, the Auto Task Force, the Labor Department, and the Executive Office of the President, or produced to the Federal Executive Branch, since January 1, 2009, related to Delphi . . . including but not limited to, documents related to the termination of the Delphi Pension Plans.'" JA 242 (quoting respondents' discovery request). The Pension Benefit Guaranty Corporation refused to provide documents, and a magistrate judge compelled discovery. Although the Pension Benefit Guaranty Corporation objected, it ultimately provided discovery responses, mooting its objections; the district court judge in Michigan therefore did not opine on the relevance of Auto Task Force-related documents. *See Ibid.*; JA 244.

More importantly, the central issue the Michigan district court identified as the basis for its discovery order is whether the Pension Benefit Guaranty Corporation could have met the statutory criteria for a judicial proceeding. ERISA provides that the Pension Benefit Guaranty Corporation 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." 29 U.S.C. § 1342(c)(1). These criteria are objective, and the documents at issue here have no apparent bearing on whether they were satisfied.[2]

3. Finally, respondents do not advance their argument by urging that Treasury waived the argument that the district court was required to weigh respondents' need for the privileged documents. Resp. Br. 50. In moving to quash, the government pointed out that respondents had obtained more than one million pages of documents from the Pension Benefit Guaranty Corporation, depositions from a related bankruptcy proceeding, and much other material, including testimony at seven congressional hearings discussing the termination of the Delphi plan. *E.g.,* Dkt. No. 15, at 11-13, 23-24. After the district court denied the motion and respondents moved to compel, the government argued that respondents failed to "make the 'focused demonstration of need'" necessary to overcome the privilege. *See* Dkt. No. 35, at 24.

It was not Treasury's burden to show that the materials were available elsewhere; as respondents concede, Treasury is "unlearned as to the full discovery

[2] Respondents suggest that their need for the requested documents is particularly strong because they have asserted a constitutional claim. Resp. Br. 37-38; *see also id.* at 6 (describing due process claim). Although respondents' complaint in the underlying litigation includes a due process challenge, that constitutional claim is unrelated to the discovery request at issue here. The Michigan court reserved judgment on respondents' due process issue (whether due process requires beneficiaries of a pension plan to receive notice and an opportunity for a hearing where, as here, the plan is terminated by agreement between the Pension Benefit Guaranty Corporation and the plan administrator). The only claim to which the Michigan court directed discovery is respondents' claim that the statutory requirements for plan termination by a court could not have been satisfied, if such an order had been sought. *See* Resp. Br. 6-7, 14. That presents no constitutional claim.

Respondents have obtained." Resp. Br. 10 n.4. It was respondents' obligation to explain why the sweeping discovery they had received suggested that the privileged documents at issue here would provide pertinent evidence not available elsewhere. And respondents have never accounted for the 120 documents they received from Treasury after the motion to compel that had been withheld under the deliberative process privilege. *See* Gov't Br. 22-23.

B. Unable To Satisfy Applicable Standards, Respondents Erroneously Propose a New Standard for Determining Whether a Proper Assertion of the Presidential Communications Privilege Has Been Overcome.

1. Unable to justify the district court's order on the basis of standards established by this Court, respondents attempt to redefine the standard for overcoming the presidential privilege to shift the focus from their failure to demonstrate a critical need for evidence contained in the documents to a case-by-case assessment of the importance of upholding the privilege. *See* Resp. Br. 39 (arguing that the Court should evaluate "the public interest in protecting the President's confidentiality" based on its assessment of "the particular circumstances" of each case). Respondents suggest that this evaluation ought to include, among other factors, the age of the documents, whether there has been a change of administration, and the precise contents of the materials.

The district court properly did not undertake an evaluation of this kind, which is without support in this Court's decisions or the purposes underlying the privilege. The presidential communications privilege is "necessary to guarantee the candor of

presidential advisers," *In re Sealed Case*, 121 F.3d at 743. It 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." *United States v. Nixon,* 418 U.S. 683, 708 (1974). And the Supreme Court has emphasized that "[t]he President's need for complete candor and objectivity from advisers calls for great deference from the courts." *Id.* at 706. Respondents' standardless evaluations would undermine the essential protections that the privilege provides.[3]

Respondents' argument also ignores this Court's admonitions in *In re Sealed Case* in distinguishing between the inquiry entailed in applying the deliberative process privilege and the inquiry involved in applying the presidential communications privilege. The Court noted that "balancing is more ad hoc in the context of the deliberative process privilege, and includes consideration of additional factors such as whether the government is a party to the litigation. Moreover, the privilege disappears altogether when there is any reason to believe government misconduct occurred." *In*

[3] Respondents cite this Court's observation in *Dellums*, 561 F.2d at 246, that "[a]n advisor to the President has no guarantee of confidentiality. His advice may be disclosed by the President or a successor." Resp. Br. 33. That is, of course, the case. But it is one thing for the White House to waive an institutional privilege and another to have a court determine that the privilege has been overcome.

re Sealed Case, 121 F.3d at 746. "On the other hand," the Court explained, "a party seeking to overcome the presidential privilege seemingly must always provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials." *Ibid.*

Respondents' own analysis of the documents at issue demonstrates both the unworkability of their proposed procedure and the absence of any support for their insistence that the rationale for the privilege in this case would be found "very weak," Resp. Br. 39, if their proposed inquiry were undertaken. Respondents declare that "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.'" Resp. Br. 41 (quoting JA 150 (in turn quoting O'Connor Decl. ¶ 7, JA 196-97)). Nothing in this Court's decisions suggests that advising the President on the proper response to a grave financial crisis implicates the concerns protected by the privilege in only a "very weak" way. And, more importantly, nothing in this Court's decisions leaves room for courts to determine that documents validly subject to the presidential communications privilege deserve a reduced degree of protection based on ad hoc assessments of the public interest in vindicating the concerns protected by the privilege. For example, respondents have no support for their contention that the

interests in protecting presidential candor are diminished over time. *Cf. Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014) (holding that decades-old document was covered by the deliberative process privilege).[4]

In urging their ad hoc sliding-scale approach, respondents confuse the limitations on the scope of the presidential communications privilege with the treatment of documents that have been found to be within the scope of the privilege. Thus, for example, respondents urge that "sixty documents did not directly involve President Obama," and that, accordingly, "the presidential communications privilege must be 'carefully circumscribed' as to them." Resp. Br. 40 (quoting *In re Sealed Case,* 121 F.3d at 752). The point made in *In re Sealed Case,* however, was that "the public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to

[4] Respondents' reliance on *Nixon v. GSA*, 433 U.S. 425, 451 (1977), for their contention that there is a diminished interest in confidentiality because the materials at issue are now eight years old is puzzling. That case involved the question of whether the Presidential Recordings and Materials Preservation Act was unconstitutional based on former President Nixon's assertions of presidential privilege. It did not suggest that documents lose their privileged status due to the passage of time. In any event, the subpoena at issue here was served in 2012, only a few years after the events at issue. And respondents' statement (Resp. Br. 41) that the confidentiality interests are diminished in this case because of public testimony on the subject is strikingly at odds with their unexplained insistence that the documents subject to the presidential communications privilege are likely to contain evidence unavailable elsewhere that demonstrates improper political influence.

the President." 121 F.3d at 751-52. The Court then explained that to avoid an undue expansion of the privilege, it was crucial that "[n]ot every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege," stressing, "[i]n particular" that "the privilege should not extend to staff outside the White House in executive branch agencies." *Id.* at 752. The Court did not suggest that application of the privilege should be further "carefully circumscribed" with respect to documents over which the privilege has properly been asserted.

Respondents' repeated reliance on *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108 (D.C. Cir. 2004), is similarly misplaced. *Judicial Watch* concerned a request under the Freedom of Information Act, where the question is simply whether the privilege applies, not whether it has been overcome. The Court there considered the scope of the privilege with respect to documents created within the Department of Justice with respect to possible presidential pardons. The majority held that the presidential communications privilege is inapplicable "to internal Justice Department documents that never make their way to the Office of the President," but that "[a]ny pardon documents, reports, or recommendations that the Deputy Attorney General submits to the Office of the President, and any direct communications the Deputy or the Pardon Attorney may have with the White House Counsel or other immediate presidential advisers will remain protected." *Id.* at 1116. Nothing in the opinion remotely endorses respondents' approach.

2. As explained in our opening brief, after concluding that the sixty-three documents fell within the presidential communications privilege, the district court then considered whether respondents had demonstrated a need for the documents that outweighed the proper assertion of privilege. In doing so, the district court cited the standard established in *In re Sealed Case* but, in fact, applied the standard set out in an earlier case, *Dellums v. Powell*. Although respondents urge that the two standards are essentially identical, Resp. Br. 34, the Court in *Dellums* found it of "cardinal significance" that the claim of privilege in that case was being asserted solely by a former President who had left office, and the government was not supporting that assertion. *Dellums*, 561 F.2d at 244-49. The Court explained that the privilege "inher[es] in the institution of the Presidency, and not in the President personally," *id.* at 247 n.14, and cited the institutional nature of the privilege as a reason to question whether the privilege could properly be asserted by a former President. *Ibid.*; *see id.* at 245, 248 (deciding the case without resolving the question). This case does not involve a "diminished" interest applicable to assertions by former Presidents unsupported by any administration. *Dellums*, 561 F.2d at 248.

Respondents are similarly incorrect in urging that *Dellums* established a standard for all cases in which a party seeks to overcome a proper assertion of the presidential communications privilege to obtain evidence for use in civil litigation. Resp. Br. 44. The standard in ordinary civil cases cannot be less stringent than that in criminal proceedings. On the contrary, as the Supreme Court has repeatedly explained, "the

need for information in the criminal context is much weightier because 'our historic[al] commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.'" *Cheney v. U.S. Dist. Court,* 542 U.S. 367, 384 (2004) (quoting *Nixon,* 418 U.S. at 708–09 (in turn quoting *Berger v. United States,* 295 U.S. 78, 88 (1935))).

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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SEPTEMBER 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 the brief contains 4,573 words according to the count of Microsoft Word.

/s/ Abby C. Wright
Abby C. Wright

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 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 September 29, 2017.

/s/ Abby C. Wright
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