

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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U.S. DEPARTMENT OF THE)	
TREASURY,)	
)	
	Petitioner,)	
)	No. 1:12-mc-00100-EGS
	v.)	
)	
PENSION BENEFIT GUARANTY)	
CORPORATION,)	
)	
	Interested Party,)	
)	
	v.)	
)	
DENNIS BLACK, <i>et al.</i> ,)	
)	
	Respondents.)	
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**PETITIONER’S OPPOSITION TO RESPONDENTS’ MOTION FOR LEAVE TO FILE
AN EX PARTE SUBMISSION**

INTRODUCTION

Respondents Dennis Black, Charles Cunningham, Kenneth Hollis, and Delphi Salaried Retiree Association have filed two motions on remand. The first motion seeks to compel petitioner U.S. Department of the Treasury (Treasury) to produce 61 of the 63 documents held to be covered in this case by the presidential communications privilege.¹ ECF No. 70 at 1; *see* ECF No. 45 at 10. The second motion seeks leave to file an *ex parte* submission in support of the motion to compel. ECF No. 71 at 1. Treasury will respond to the motion to compel in due

¹ Respondents have renounced by means of their motion to compel any interest in Doc. Nos. 612 and 778. ECF No. 70, Mem. at 4 & n.2. Doc. No. 612 is a “draft[] of [a] presidential speech[.]” ECF No. 45 at 4 n.1. Doc. No. 778 is a duplicate of Doc. No. 612. ECF No. 51-2 at 77.

course.² The motion seeking leave to file an *ex parte* submission should be denied because respondents have not shown that any circumstance exists in this case that would make the filing of respondents' *ex parte* submission appropriate.

ARGUMENT

“The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts.” *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986). The “firmly held main rule” is thus that “a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions.” *Id.* at 1061. Because “[e]xceptions to the main rule are both few and tightly contained,” *id.*, “*ex parte* proceedings should be employed to resolve discovery disputes only in extraordinary circumstances.” *Gilmore v. Palestinian Interim Self-Gov’t Auth.*, 843 F.3d 958, 967 (D.C. Cir. 2016). “[S]ome of the circumstances in which [such] proceedings have been permitted” include “determin[ing] whether documents enjoy a privilege against discovery . . . prevent[ing] frustration of a statutory purpose to limit access to Government papers . . . [and] resolv[ing] fears of intimidation of a witness.” *Id.* (quoting *Clifford v. United States*, 136 F.3d 144, 149 (D.C. Cir. 1998)). The circumstances in which *ex parte* proceedings have been permitted also include determining whether materials are protected from use “in the litigation” by an “evidentiary privilege.” *Abourezk*, 785 F.2d at 1061. “These ‘extraordinary circumstances’ share a common feature: the need for secrecy in light of the substantial adverse consequences of disclosure.” *Gilmore*, 843 F.3d at 967.

² March 16, 2018, is the deadline for Treasury’s response to the motion under the minute order dated February 1, 2018.

Respondents argue in this case that they should be permitted to file an *ex parte* submission in support of their motion to compel because “the Court has previously allowed Treasury to make *ex parte* submissions to the Court in connection with these 61 documents.” ECF No. 71, Mem. at 2. This argument is without merit. “The Supreme Court ‘has approved the practice of requiring parties who seek to avoid disclosures of documents to make the documents available for *in camera* inspection, and the practice is well established in the federal courts.’” *Gilmore*, 843 F.3d at 967 (quoting *United States v. Zolin*, 491 U.S. 554, 569 (1989)). The rationale for “requiring parties who seek to avoid disclosures of documents to make the documents available for *in camera* inspection” has no applicability to a case, like this one, in which a party seeking to compel the production of documents seeks leave to file an *ex parte* submission in support of its motion to compel their production.

Respondents also argue that they should be permitted to file an *ex parte* submission in support of their motion to compel because Treasury and interested party Pension Benefit Guaranty Corporation (PBGC) will find out what arguments respondents intend to make when they move for summary judgment in their pending action against PBGC if they are not permitted to file their proposed submission on an *ex parte* basis. ECF No. 71, Mem. at 1. Respondents base this argument on *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), and *United States v. Poindexter*, 727 F. Supp. 1470 (D.D.C. 1989). *Id.* at 1-2. Both of these cases are inapposite. The Office of Independent Counsel was permitted in *Sealed Case* to submit “an *ex parte* affidavit and other materials” to demonstrate why “the grand jury” had a need for certain documents covered by the presidential communications privilege, 121 F.3d at 760, but the submission of the affidavit by the Office of Independent Counsel was justifiable “in order to preserve the secrecy of the grand jury’s investigation.” *See id.* A criminal defendant was

permitted in *Poindexter* to avoid “reveal[ing] to the prosecution the theories of his defense” by “explain[ing] to the Court on an ex parte basis precisely how [certain] Presidential and Vice Presidential documents would corroborate his claims,” 727 F. Supp. at 1479 & n.16 (fn. omitted), but the defendant’s being permitted to proceed in that fashion was justifiable as a measure intended to “fully protect [his] rights – the consideration that must be paramount in a criminal case.” *Id.* at 1487. *Poindexter* was also a case in which no “issue of privilege” had been raised with respect to the “Presidential and Vice Presidential papers” that the defendant wished to use. *Id.* at 1479 n.17.

This case involves civil discovery, not a grand jury investigation or a criminal prosecution, and thus is fundamentally different from *Sealed Case* and *Poindexter*. What this case involves, instead, is a group of civil litigants who wish to avoid disclosing until the last minute the arguments they intend to make when they move for summary judgment in their action against PBGC. ECF No. 71, Mem. at 1. Respondents’ motion for summary judgment will be a motion against PBGC, not a motion against Treasury, because Treasury is not a party to the action in which the motion will be filed. *See* ECF No. 10-7 at 16 (dismissing Treasury as a defendant from that action). The desire of respondents to conceal from Treasury the arguments upon which they intend to base their proposed motion for summary judgment against PBGC thus provides no justification for the concealment of any of the arguments upon which they base their pending motion to compel against Treasury, much less a justification for the concealment of any of those arguments that rises to the level of an “extraordinary circumstance[.]” *See Gilmore*, 843 F.3d at 967. Respondents ought not to be permitted, therefore, to file an *ex parte* submission in support of their motion to compel.

CONCLUSION

Respondents' motion for leave to file an *ex parte* submission should be denied for the foregoing reasons.

Respectfully Submitted,

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s/ David M. Glass

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Dated: February 28, 2018

CERTIFICATE OF SERVICE

I hereby certify that I served the within memorandum on all counsel of record by filing it with the Court by means of its ECF system on February 28, 2018.

s/ David M. Glass