

Supreme Court Litigation

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COURT FILINGS AND OPINIONS

SUPREME COURT

No. 96-1783, Office of the President v. Office of Independent Counsel, et al., Brief for the Federal Respondent in Opposition, May 1997

No. 97-1192, Swidler & Berlin and James Hamilton v. United States of America, Brief for the United States in Opposition

No. 97-1924, United States of America v. Williams Jefferson Clinton and The Office of the President of the United States, Petition for a Writ of Certiorari, May 28, 1998 (REDACTED VERSION), Appendix (REDACTED VERSION), and Reply Brief in Support of Petitioner, June 2, 1998 (REDACTED VERSION)

No. 97-1942, United States of America v. Robert E. Rubin, Secretary of the Treasury, and Lewis C. Merletti, Director of the United States Secret Service, Petition for a Writ of Certiorari, June 4, 1998 (REDACTED VERSION) and Appendix (REDACTED VERSION)

No. 98-93, Robert E. Rubin, Secretary of the Treasury, and Lewis C. Merletti, Director of the United States Secret Service v. United States of America, Brief for the United States in Opposition,

No. 96-1783

In the Supreme Court of the United States

OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT,
Petitioner

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

**BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

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QUESTIONS PRESENTED

1. Section 535(b) of Title 28 requires that a federal government agency expeditiously provide to federal law enforcement authorities “[a]ny information” relating to federal criminal violations. The question presented is whether, in light of Section 535(b), a federal government agency may withhold relevant information subpoenaed by a federal grand jury.

2. If Section 535(b) does not apply, a second question presented is whether, under Federal Rule of Evidence 501, a federal government agency may rely on a governmental attorney-client or work product privilege to withhold relevant information subpoenaed by a federal grand jury.

3. If a federal government agency can maintain governmental attorney-client and work product protections in federal grand jury proceedings, a third question presented is whether petitioner has satisfied the requirements of those protections.

(i)

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States, represented in this criminal investigation by the Independent Counsel In re: Madison Guaranty Savings & Loan Association, see 28 U.S.C. 594(a); the White House Office, which has referred to itself "[f]or convenience" as the "Office of the President" since its September 30, 1996, brief in the district court; and Hillary Rodham Clinton, who was an intervenor in the court of appeals and who has filed a response in support of the petition for a writ of certiorari.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is not yet reported. The opinion of the district court (Pet. App. 62a-83a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1997. The petition for a writ of certiorari was filed on May 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 5, 1994, pursuant to the application of Attorney General Reno under 28 U.S.C. 592(c), the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels, appointed Kenneth W. Starr as Independent Counsel to represent the United States in investigating and prosecuting matters "relating in any way to

James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." *In re Madison Guaranty Savings & Loan Association*, at 2 (D.C. Cir. Spec. Div. Aug. 5, 1994).

Madison Guaranty was a federally insured savings and loan in Little Rock, Arkansas, operated by James B. McDougal and Susan H. McDougal. Hillary Rodham Clinton performed work for Madison in her capacity as an attorney at the Rose Law Firm in Little Rock. Capital Management Services was a federally licensed small business investment company in Little Rock operated by David L. Hale, a Little Rock judge and businessman. Whitewater Development Company was a real estate venture owned by the McDougals and the Clintons. David Hale, James McDougal, Susan McDougal, and nine other individuals have been convicted of federal crimes during this investigation.¹

This Office has investigated events occurring in the aftermath of the July 20, 1993, death of former Deputy White House Counsel Vincent W. Foster, Jr., including the handling of documents from his White House office. Bates Decl. ¶ 2 (App. 16).² On July 22, 1993, Whitewater-related documents (along with others) were transferred from Mr. Foster's office in the White House's West Wing to a room on the third floor of the White House Residence.

¹ On March 22, 1994, Hale pled guilty to a two-count felony information. On May 28, 1996, the McDougals were convicted by jury verdict, along with the then-Governor of Arkansas Jim Guy Tucker. The jury found James McDougal guilty of 18 felony counts including conspiracy, bank fraud, misapplication, false entry, and mail fraud. The jury found Susan McDougal guilty of four felony counts including mail fraud, misapplication, false entry, and false statements. The jury found Tucker guilty of one count of conspiracy and one count of mail fraud.

² The citations to "App." refer to Appellant's Appendix in the court of appeals.

On July 27, 1993, documents that had been in Mr. Foster's office and stored on the third floor of the Residence were taken from the Residence to the Clintons' personal lawyers.

This Office also has investigated the circumstances surrounding the discovery of certain copies of Rose Law Firm billing records that reflect Mrs. Clinton's legal work for Madison (and contain handwritten notes of Mr. Foster). Bates Decl. ¶ 2 (App. 16). The records, which were responsive to a May 1994 grand jury subpoena to Mrs. Clinton, were produced to this Office by Mrs. Clinton's personal attorney in January 1996. White House aide Carolyn Huber publicly testified that she found the copies (the originals have never been produced) on the third floor of the White House Residence in August 1995; placed them in a box without realizing exactly what they were; and then discovered the records in her East Wing office in January 1996.

2. This Office has sought numerous documents by grand jury subpoena from the Executive Office of the President and its constituent parts, including the White House Office. This Office informed the White House in March 1995—*before either of the two sets of notes at issue here were created*—that we did not accept the proposition that governmental attorney-client or work product privileges authorized the White House to withhold relevant information from the grand jury. Bates Decl. ¶ 10 (App. 17-18).

Among the documents sought during the course of the criminal investigation have been notes taken by White House officials (including White House attorneys) during meetings or interviews with personnel who were participants in or witnesses to events under criminal investigation. *The White House has produced White House attorneys' notes of their meetings with numerous White House officials.* For example, the White House produced notes taken by White House attorneys during meetings with former White House Counsel Bernard Nussbaum

and Assistant to the President Margaret Williams regarding the handling of documents from Mr. Foster's office in the wake of his death. Bates Decl. ¶ 12 (App. 18). In addition, as is publicly known, White House attorneys have testified before the grand jury about their work.

3. The grand jury subpoena here was issued after this Office learned of certain meetings in 1995 and 1996 between Mrs. Clinton and White House attorneys. It required production of documents reflecting those meetings to the extent they related to subjects including Madison, Whitewater, James B. McDougal, David L. Hale, or Vincent W. Foster, Jr. App. 3. The White House identified nine sets of responsive documents but refused production, interposing claims of Executive privilege, attorney-client privilege, and work product. App. 7-12.

4. On August 19, 1996, this Office filed a motion to compel production of two sets of documents: (1) notes taken by Associate White House Counsel Miriam Nemetz on July 11, 1995, at a meeting with Mrs. Clinton, Special White House Counsel Jane Sherburne, and Mrs. Clinton's personal attorney David Kendall; and (2) notes taken by Ms. Sherburne at meetings with Mrs. Clinton on January 26, 1996, which were also attended by Mr. Kendall and his partner Nicole Seligman, and in part by Jack Quinn, then the White House Counsel. App. 13; Sherburne Decl. ¶¶ 16, 20 (Pet. App. 89a, 90a). The July 11, 1995, notes relate to Mrs. Clinton's activities in the aftermath of Mr. Foster's death. Sherburne Decl. ¶ 16 (Pet. App. 89a). The January 26, 1996, notes relate to Mrs. Clinton's testimony about the Rose Law Firm billing records reflecting Mrs. Clinton's work for Madison. Sherburne Decl. ¶¶ 18-20 (Pet. App. 89a-90a).³

³ Mrs. Clinton was questioned by this Office at the White House on July 22, 1995. She was questioned before the grand jury on January 26, 1996. In the district court, this Office set forth why the subpoenaed notes were relevant, and offered to make a further submission in camera.

The parties disputed whether a federal government agency can maintain *governmental* attorney-client and work product protections to withhold relevant information in federal grand jury proceedings.⁴ The district court issued its decision on November 26, 1996. Although noting that “[t]he issues in this case have been complicated somewhat by the manner in which the White House Counsel’s office has defined its area of responsibility,” Pet. App. 75a n.7, the court did not address the fundamental privilege issue. Relying instead on a narrow, factbound argument advanced by Mrs. Clinton, the district court accepted the privilege claim, basing its conclusion on “the reasonable belief of the White House and Mrs. Clinton that the communications were privileged and by the fact that the notes are attorney work product.” *Id.* at 82a.

5. The court of appeals reversed. Pet. App. 1a-61a. The court began with Federal Rule of Evidence 501, which states that privileges in federal proceedings are “governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience.” *Id.* at 5a. Privileges “are not lightly created nor expansively construed” under Rule 501, for they “are in derogation of the search for truth.” *Id.* at 12a (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

Turning to the question presented, the court observed that the decision in “*Nixon* is indicative of the general principle that the government’s need for confidentiality may be subordinated to the needs of the government’s own criminal justice processes.” Pet. App. 15a. The court rejected the White House’s argument that, notwithstanding *Nixon*, a government agency is entitled to the same evidentiary privileges as a private corporation. The court noted several important differences between the government and private organizations, including that the

⁴ Without explanation, the White House withdrew its claim of Executive privilege on September 30, 1996.

actions of White House personnel “cannot expose the White House as an entity to criminal liability,” and that “executive branch employees, including attorneys, are under a statutory duty to report” information relating to criminal violations. *Id.* at 17a (citing 28 U.S.C. 535(b)).

The court also found that the “general duty of public service calls upon government employees and agencies to favor disclosure over concealment.” Pet. App. 17a. The court of appeals noted, in this regard, that the Supreme Court had rejected a proposed privilege for accountants because of their “public responsibility” and “public obligations.” *Id.* at 17a-18a (quoting *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984)). The court of appeals explained that “[t]he public responsibilities of the White House are, of course, far greater than those of a private accountant performing a service with public implications.” Pet. App. 18a. The court added:

[T]he strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.

Ibid.

The court similarly concluded that a governmental work product protection, like the governmental attorney-client privilege, could not shield the notes from the grand jury. Pet. App. 25a-27a. Finally, the court rejected the district court’s analysis, stating that “we know of no authority, and Mrs. Clinton has cited none, holding that a client’s beliefs, subjective or objective, about the law of privilege can transform an otherwise unprivileged conversation into a privileged one.” *Id.* at 24a.

District Judge Kopf, sitting by designation, dissented. He agreed that the White House's argument for an absolute attorney-client privilege was inconsistent with this Court's decision in *Nixon*, which "teaches that the President's general need for confidentiality (expressed here by the attorney-client privilege) is outweighed by a grand jury's need for evidence of the truth." Pet. App. 51a. He concluded that "it is a reasonable extension of *Nixon* to pierce the organizational attorney-client privilege asserted by the White House," *id.* at 57a, and "[t]he same analysis justifies piercing the work product 'privilege,'" *id.* at 51a n.4. Under the particular facts, however, Judge Kopf would have applied the decision prospectively only, and thus would have affirmed the judgment of the district court. *Id.* at 60a-61a.

ARGUMENT

The legal issue before the Court is one of first impression in the federal courts. Not only is there no circuit conflict, but only three federal judges—the court of appeals panel in this case—have addressed the question.⁵ Significantly, all three judges rejected petitioner's argument for blanket governmental attorney-client and work product privileges in federal criminal proceedings.

The issue is exceedingly narrow. The case presents only the application, in this particular grand jury setting, of Federal Rule of Evidence 501 and 28 U.S.C. 535(b).⁶ The petition raises no constitutional question. Nor does the case concern the availability or scope of governmental privileges in civil or congressional proceedings, or under the Freedom of Information Act.

What the case presents, at bottom, is a bold assertion of a *governmental* privilege against a federal grand jury's interest in securing relevant evidence. The decision of

⁵ The district court did not address this issue.

⁶ Federal Rule of Evidence 501 and 28 U.S.C. 535(b) are set out in an appendix to this brief.

the court of appeals rejecting that assertion is thoroughly and soundly grounded in law and public policy. To grant plenary review when the case law is so sparse (and the decision of the court of appeals so well-reasoned) not only would represent a departure from the Court's customary practice, it would occasion further delay in sensitive grand jury proceedings in which the national interest would be served by the uninterrupted completion of the criminal justice process.

For those reasons, the petition should be denied.

I

1. At the outset, we note the obvious: This Court's review would delay a highly sensitive criminal investigation; indeed, several parts of the investigation could remain frozen for an additional three to twelve months. "[D]elay is fatal to the vindication of the criminal law." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). That is especially true in the investigative stage. Because "extended litigation" impedes the "orderly progress of an investigation," *United States v. Calandra*, 414 U.S. 338, 349 (1974), and "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws," *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991), federal courts attempt to avoid the "protracted interruption of grand jury proceedings," *Calandra*, 414 U.S. at 349-350.

2. In any event, the dictates of this Court's Rule 10 counsel strongly against review at this time. Not only is there no circuit conflict, but in only one reported case before this dispute, so far as the parties are aware, has the issue even arisen.⁷ The novelty of the issue in the

⁷ The issue in that case involved a state agency; the court of appeals did not analyze the privilege issue, but instead remanded for consideration of the application of state sunshine laws. See *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989). One intermediate state court decision addressed a similar issue under state law, but the case involved a private law firm retained by a

courts counsels hesitation before this Court exercises its discretionary certiorari jurisdiction. See *Lackey v. Texas*, 115 S. Ct. 1421, 1421-1422 (1995) (Stevens, J., respecting denial of certiorari) (“importance and novelty” of a question with “potential for far-reaching consequences” provide “principled basis for postponing consideration of the issue until after it has been addressed by other courts”).

3. Not only is the issue novel in the courts, it is extraordinarily narrow. The question here concerns *governmental* attorney-client and work product protections in federal *criminal* proceedings. See Fed. R. Evid. 501, 1101(c), (d). The issues *not* presented include the following:

First, the case raises no issue regarding the application of government attorney privileges in *civil* proceedings. See Pet. App. 5a.⁸ The court of appeals’ decision is entirely consistent with recognition of governmental attorney-client and work product privileges in federal civil proceedings,⁹ where the government is opposed to a private party and where evidentiary privileges generally carry more weight. Cf. *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974).

Second, because Rule 501 does not apply to congressional proceedings, the case implicates no question re-

state agency, not government attorneys who were public employees, a distinction of importance under state law. See *In re Grand Jury Subpoenas Duces Tecum*, 574 A.2d 449, 455 (N.J. Super. Ct. App. Div. 1989). See also Pet. App. 8a-10a.

⁸ Nor is any issue presented regarding the scope of a criminal defendant’s discovery from the Government. Such discovery is governed by settled principles under Fed. R. Crim. P. 16, Fed. R. Crim. P. 26.2, 18 U.S.C. 3500, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

⁹ That includes proceedings under the Freedom of Information Act (FOIA), in which government agencies can withhold documents based on the civil litigation privileges ordinarily available to private parties. 5 U.S.C. 552(b) (5).

garding the scope of the privileges that a government agency (or an individual) can maintain in congressional proceedings.¹⁰

Third, the case presents no question as to the scope of the privileges that an individual or private corporation can maintain in any proceedings, civil or criminal.

Fourth, no constitutional issue is presented. Indeed, because the question involves the application of a federal statute and a federal rule of evidence, Congress can further study the issue and address it legislatively at any time.

Fifth, petitioner has not challenged the jurisdiction or authority of this Office to represent the United States in conducting this criminal investigation. See 28 U.S.C. 594(a), 596(a)(1). Nor has petitioner asked the Court to reconsider *Morrison v. Olson*, 487 U.S. 654 (1988), or raised any issue of separation of powers.

Finally, petitioner has not raised the question whether Mrs. Clinton's asserted expectation about the law was sufficient to render the communications privileged, which was the basis for the district court's decision. Petitioner also has not raised the question of possible prospective-only application, which in the end was the main issue on which the dissenting judge disagreed with the panel majority in the court of appeals. Hence, those two issues are not before this Court. See Sup. Ct. R. 14.

4. Petitioner indicates that it seeks review because an important principle is at stake, not because of these notes. See Pet. 9-10. The undisputed record belies such a claim. The White House has produced reams of attorney notes virtually identical to those at issue here, *including attorney notes addressing the same subject matters*. Bates Decl.

¹⁰ Congress recognizes privileges as required by the Constitution or pursuant to its own rules and practices under its Article I authority. See S. Rep. No. 104-191, at 11-12 (1995).

¶ 12 (App. 18).¹¹ The only difference here is that these notes reflect communications with Mrs. Clinton. Petitioner has explained that distinction by saying simply that White House attorneys' documents have been disclosed when that "could be accomplished without compromising important governmental interests." Sherburne Supp. Decl. ¶ 3 (App. 31). The explanation is untenable: No principle, no governmental interest, justifies releasing attorneys' notes of communications with government officials such as Bernard Nussbaum and Margaret Williams *and* simultaneously withholding attorneys' notes of communications with Mrs. Clinton—given that all of the notes concern the same subject matter.

II

The decision of the court of appeals is correct. It is dictated by four separate sources of law: Section 535(b) of Title 28, traditional considerations under Federal Rule of Evidence 501, this Court's precedent (particularly *United States v. Nixon*), and compelling public policies.

1. Federal Rule of Evidence 501 provides that privileges in federal proceedings are "governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience" except, *inter alia*, as "provided by Act of Congress." Here, Section 535(b) of Title 28 imposes a specific disclosure obligation on Executive Branch employees that requires rejection of petitioner's common-law privilege claim. The statute provides:

Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency * * *.

¹¹ The technical question whether petitioner waived the privilege as to these notes was complicated, however, because attorneys for two clients were present for the communications. See *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 556 (8th Cir. 1990).

28 U.S.C. 535(b) (originally enacted as Act of Aug. 31, 1954, ch. 1143, § 1, 68 Stat. 998, 998). Labeling the statute “significant,” the court of appeals stated that “executive branch employees, *including attorneys*,” have a duty to report information relating to criminal wrongdoing. Pet. App. 17a (emphasis added).¹²

a. The language of the statute is clear and all-encompassing. It admits of no distinction between information obtained by government attorneys and that obtained by other government employees. See *International Longshoreman’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 225 (1982) (“[i]n the absence of any limiting language in the statute or legislative history, we find no reason to conclude that Congress intended such a potentially expansive exception to a statutory provision”).

In addition, Congress’ inclusion of a specific exception for “class[es] of information” as to which the Attorney General “directs otherwise,” 28 U.S.C. 535(b)(2), confirms that the statute means what it says and says what it means—and that no further exceptions should be judicially inferred or created. See *United States v. Smith*, 499 U.S. 160, 167 (1991) (“Congress’ express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception”); *Honig v. Doe*, 484 U.S. 305, 325 (1988) (Court “not at liberty to engraft onto the statute an exception Congress chose not to create”).¹³

¹² The information sought by the grand jury “involv[es] Government officers and employees.” 28 U.S.C. 535(b). The notes here are relevant to the grand jury’s investigation of several present or former White House officers and employees.

¹³ Similarly, in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), Title VII provided for government access to information relevant to a discrimination charge. A university argued for a “privilege” exception for academic peer review materials. The Court rejected the claim, stating that the Title VII provisions “[o]n their face * * * do not carve out any special privilege relating to peer review materials.” *Id.* at 191.

b. The legislative history confirms and strengthens that conclusion. The House Committee Report accompanying Section 535 states that “[t]he purpose” of the provision is to “require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning *any alleged irregularities* on the part of officers and employees of the Government.” H.R. Rep. No. 83-2622 (1954) (emphasis added), *reprinted in* 1954 U.S.C.C.A.N. 3551, 3551. The report emphasizes that “[i]f the Attorney General or the Federal Bureau of Investigation undertakes such investigation, they should have *complete cooperation* from the department or agency concerned.” *Id.* at 3552 (emphasis added). The Justice Department supported the legislation. Then-Deputy Attorney General Rogers expressed the Department’s views as follows:

The Department of Justice urges the prompt enactment of the measure, for such legislation will emphasize the congressional intent that the chief law-enforcement officer of the Government is to have *free access* to all units thereof for the purpose of ferreting out personnel criminally violating their trusts and oaths of office.

Id. at 3553 (emphasis added).¹⁴

c. This analysis is also consistent with traditional understandings. For example, Lloyd N. Cutler, who has served as White House Counsel in two Administrations, has remarked that there can be “problems relating to misconduct that you learn about somewhere in the White House or elsewhere in the Government.” Cutler, *The Role of the Counsel to the President of the United States*, in *The Record of the Association of the Bar of the City of New York*, Vol. 35, No. 8, at 470, 472 (1980). Mr. Cutler noted that there is a “rule of making it your duty, *if you’re a Government official as we as lawyers are, a*

¹⁴ “When issuing [grand jury] subpoenas, an independent counsel stands in the place of the Attorney General.” S. Rep. No. 100-123, at 22 (1987); see 28 U.S.C. 594(a).

*statutory duty to report to the Attorney General any evidence you run into of a possible violation of a criminal statute.” Ibid. (emphasis added). Mr. Cutler further remarked that “[w]hen you hear of a charge and you talk to someone in the White House * * * about some allegation of misconduct, almost the first thing you have to say is, ‘I really want to know about this, but anything you tell me I’ll have to report to the Attorney General.’” Ibid.¹⁵*

d. In addition, federal regulations require each agency to have a “designated ethics official,” generally an attorney, to provide ethics counseling to employees. 5 C.F.R. 2635.107. The regulations state: “Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code.” *Ibid.*

e. In attempting to avoid the import of Section 535(b) during this litigation, petitioner has advanced several arguments “reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini.” *United Steelworkers of America v. Weber*, 443 U.S. 193, 222 (1979) (Rehnquist, J., dissenting). Here, petitioner inters the statute in a footnote, noting (without any explanation) two arguments. See Pet. 22-23 n.7.¹⁶

¹⁵ Similarly, petitioner has previously acknowledged these disclosure obligations. The 1993 White House report on the Travel Office episode stated that “White House personnel may find that they have information about a *possible* violation of law. If there is a reasonable suspicion of a crime * * * about which White House personnel *may have* knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General.” White House Travel Office Management Review 23 (July 2, 1993) (emphases added).

¹⁶ It is not disputed that the Executive Office of the President and the component White House Office are covered by Section 535. See

First, petitioner refers generally to the “legislative history” of Section 535. Pet. 22 n.7. As noted above, however, the legislative materials strongly support the text.

Second, petitioner cites several unpublished Office of Legal Counsel (OLC) memoranda. But those memoranda have no application here. Under authority delegated by the statute, the Attorney General has authorized an exception to Section 535(b) for information obtained by government attorneys who, pursuant to a specific regulation (28 C.F.R. 50.15), represent employees in their *personal* capacities—for example, in civil suits alleging *Bivens* violations. The OLC memoranda cited by petitioner address only the exception for these *personal* representations.¹⁷ The Justice Department regulation and the OLC memoranda do not (and do not purport to) apply to situations where a government attorney represents a *government agency* and learns information during the course of her *official* representation of that agency.¹⁸

Pet. 22-23 n.7; W.H. Br. 40-43 (filed in 8th Cir. Jan. 30, 1997); W.H. Supp. Br. 7-8 (filed in E.D. Ark. Nov. 6, 1996; under seal); U.S. Supp. Br. 9-12 (filed in E.D. Ark. Nov. 6, 1996; under seal).

¹⁷ See OLC Mem. of Mar. 29, 1985, at 5 (analyzing duty under 50.15 and 535(b) of an Assistant U.S. Attorney who discovered information while representing *Bivens* defendants); OLC Mem. of Apr. 3, 1979, at 1 (addressing question regarding “propriety of providing Justice Department representation in a civil suit to a government employee”); OLC Mem. of Aug. 30, 1978, at 4 (analyzing under 50.15 and 535(b) the “contours of the relationship between a Department attorney and an individual government employee whose representation has been undertaken”); OLC Mem. of Nov. 30, 1976, at 1 (addressing question regarding situation where “[t]he U.S. Attorney’s Office is currently representing both a Federal employee and the United States as defendants in a civil suit for damages”).

¹⁸ Cf. 6 Op. Off. Legal Counsel 626, 627 (1982) (stating, in context of proposal for certain kinds of inspector general investigations, that “evidence of criminal conduct ‘uncovered’ during the course of an investigation, will be referred directly to the Department of Justice, *as is required by 28 U.S.C. § 535*”). OLC is well-versed in the crucial distinction between representation of the

The court of appeals correctly stated that the OLC memoranda deal with representations of individuals pursuant to 28 C.F.R. 50.15 and that “[n]o such personal attorney-client relationship exists between Mrs. Clinton and the White House attorneys.” Pet. App. 19a n.10.¹⁹

In this case, in sum, the grand jury subpoena requires disclosure unless a valid privilege applies. Because petitioner’s common-law privilege claim is contravened by Section 535(b), the notes must be produced.

2. Even if Section 535(b) were erased from the United States Code, petitioner’s claim would fail under traditional Rule 501 privilege analysis. Federal courts are deeply committed to the principle that “the public has a right to every man’s evidence,” *Jaffee v. Redmond*, 116 S. Ct. 1923, 1928 (1996) (quotation omitted)—a principle “particularly applicable to grand jury proceedings,” *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). Because testimonial privileges “obstruct the search for truth,” there is a “presumption against the existence of an asserted testimonial privilege.” *Id.* at 690 n.29, 686. Privileges thus “are not lightly created nor expansively construed.” *Nixon*, 418 U.S. at 710.

In light of those settled principles, this Court has recognized common-law privileges, or applied them in a particular setting, only when the privilege (or application thereof) is historically rooted or recognized in the vast majority of the States—and is justified by overriding public policy considerations. See Pet. App. 12a-13a. Here, the roots are nonexistent; to the contrary, the parties have found no case, statute, rule, or agency opinion suggesting that a

personal interests of a government employee and representation of the governmental interests of a government agency. See, e.g., 4B Op. Off. Legal Counsel 749, 751 (1980) (distinguishing between representation of personal interests and governmental interests).

¹⁹ White House attorneys did not represent Mrs. Clinton in her personal capacity. See *Sherburne Decl.* ¶¶4, 7-10, 17, 21 (Pet. App. 84a-90a); *Kendall Aff.* ¶¶ 2-3 (Pet. App. 92a-93a). Such representation is not authorized. See 3 U.S.C. 105(a)(1); 28 C.F.R. 50.15(a)(4); 4B Op. Off. Legal Counsel 749, 753 (1980).

department or agency of the United States (or any state governmental entity) can maintain a governmental attorney-client or work product privilege in federal criminal or grand jury proceedings.²⁰ Nor are we aware of a contemporary *state* case, law, or rule adopting such privileges for public attorneys in the criminal context.

The practice of Executive Branch agencies further suggests that the application of the privilege is not rooted in historical practice or contemporary understandings. In the Iran-Contra investigation, for example, White House and other government lawyers provided extensive information about their conversations with the President and other government officials. See, *e.g.*, Final Report of the Independent Counsel for Iran/Contra Matters, Vol. I, at 44, 346-348, 366-368, 470 n.137, 474-479, 517, 520, 536 & nn.116 & 117 (Aug. 4, 1993). What is more, in this very investigation, the White House and other Executive Branch agencies have disclosed considerable information that, under petitioner's argument, is protected by attorney-client or work product privilege.

Consistent practice, coupled with the absence of any authority supporting petitioner, refutes the claim that a governmental attorney-client or work product privilege has traditionally been understood to justify withholding relevant information from the federal criminal process. Cf. *BankAmerica Corp. v. United States*, 462 U.S. 122, 131 (1983) ("Government's failure for over 60 years to exercise the power it now claims * * * strongly suggests that

²⁰ Petitioner cites a 1982 OLC opinion, see 6 Op. Off. Legal Counsel 481 (1982), but as the court of appeals indicated, that OLC opinion says nothing about the application of governmental common-law privileges in federal criminal proceedings. See Pet. App. 18a n.10. Even for purposes of congressional inquiries, moreover, OLC has stated that "communications between the Attorney General, his staff, and other Executive Branch 'clients' that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications." 10 Op. Off. Legal Counsel 68, 78 (1986).

it did not read the statute as granting such power"). The total absence of historical or contemporary support for petitioner's position demonstrates that the privilege claim in this context is a latter-day contrivance that warrants rejection. Cf. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 195 (1990); *Branzburg*, 408 U.S. at 685-687.

3. In addition, as all three judges on the court of appeals panel concluded, petitioner's argument contravenes this Court's decision in *Nixon*. The decision in *Nixon* held that the Executive privilege for Presidential communications—a privilege that is constitutionally based, historically rooted, and "fundamental to the operation of Government," 418 U.S. at 708—was overcome by the need for relevant evidence in criminal proceedings. *Nixon* leads inexorably to the conclusion that a governmental attorney-client or work product assertion similarly must yield to the need for relevant evidence in criminal proceedings. See Pet. App. 15a; accord *id.* at 51a, 57a (Kopf, J., dissenting). It is untenable as a matter of federal common law to say that communications between a President and his closest advisors (subject to a deeply rooted constitutional and common-law privilege "fundamental to the operation of Government") are *less* worthy of protection in criminal proceedings than are communications between any government employee and government attorney (as to which there is neither historical nor contemporary support for the privilege application).

Petitioner suggests that the personal attorney-client privilege exists in criminal proceedings notwithstanding *Nixon*, so why not a governmental attorney-client privilege? Pet. 22. That argument would have force only if there were *no* differences between public and private entities for purposes of common-law privileges in criminal proceedings. But those differences do exist, and they are of profound relevance to a reasoned analysis of the issues presented. Indeed, this Court has firmly rejected the suggestion that the common law of privileges takes no account of the different responsibilities of public and private

entities. In declining to apply a privilege to an accountant's workpapers, the Court emphasized:

The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. * * * [T]he independent auditor assumes a *public* responsibility transcending any employment relationship with the client. * * * This "public watchdog" function demands that the accountant maintain total independence from the client at all times *and requires complete fidelity to the public trust*. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with *public* obligations.

United States v. Arthur Young & Co., 465 U.S. 805, 817-818 (1984) (emphases added). Government attorneys, far more than accountants, owe a *public* duty that is inconsistent with application of governmental attorney-client and work product privileges in federal criminal proceedings.²¹

²¹ Respected commentators and the Restatement similarly reject petitioner's equation of private corporations to public entities in this context. See 1 *McCormick on Evidence* § 87.1, at 321 (4th ed. 1992) ("where the entity in question is governmental * * *, significantly different considerations appear"); 24 *Wright & Miller, Federal Practice and Procedure* § 5475, at 126-127 (1986) ("[T]he costs of the government privilege may be very high. * * * [L]egitimate claims for governmental secrecy should all be worked out in the context of the existing privileges for secrets of state and official information."); Restatement (Third) of the Law Governing Lawyers § 124 cmt. b. (Mar. 29, 1996) ("[U]nlike persons in private life, a public agency or officer has no autonomous right of confidentiality in communications relating to governmental business."); *ibid.* ("More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.").

4. Even if petitioner's proposed privilege application were both (i) rooted in historical or contemporary law and (ii) consistent with this Court's precedent, petitioner still would have to demonstrate a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Jaffee*, 116 S. Ct. at 1931. The court of appeals correctly concluded that relevant policy considerations point decisively against petitioner's position.

Under petitioner's theory, a government official (including a President) could tell a White House or other agency attorney that he shredded subpoenaed documents or paid off a potential witness or erased a subpoenaed tape or concealed subpoenaed documents. An agency employee could tell an agency attorney that he had falsified his financial disclosure form or embezzled money from the agency. A prison guard might admit to a state agency attorney that he had beaten a prisoner. The possibilities are legion. Yet under petitioner's theory, such revelations of evidence of wrongdoing could be protected from disclosure to a federal grand jury.

It strains credulity to suggest that such results, in which attorneys who are *public* employees conceal information from the criminal process, are justified by a "*public good*." There is no escape from the unsettling consequence of petitioner's theory: Government agencies would be allowed to shield evidence of serious wrongdoing from the grand jury. As the court of appeals concluded, that result would flout "the strong public interest in honest government" and "would represent a gross misuse of public assets." Pet. App. 18a.²²

²² As Judge Weinstein has stated: "If there is wrongdoing in government, it must be exposed. The law officer has a special obligation * * *. His duty to the people, the law, and his own conscience requires disclosure * * *." Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 Maine L. Rev. 155, 160 (1966).

Petitioner nonetheless cites policy concerns that, it says, justify the privilege, even in federal *criminal* proceedings.²³ Petitioner contends, for example, that government attorneys must be able to obtain facts to properly perform their functions—providing advice as to privileges, gathering and producing documents, making personnel decisions, rendering public statements, and the like. Pet. 3, 16. But the interest in *gathering* facts to perform those functions in no way requires the further step of *concealing* facts from a federal grand jury if the facts are (or become) relevant to a federal criminal investigation.

Petitioner responds, however, that there might otherwise be a chilling effect on government attorneys and employees. Pet. 14-16. This is familiar argument,²⁴ and this

²³ Petitioner's argument that the attorney-client privilege must apply in the same absolute manner for corporations and government entities begs the true question whether there are relevant differences between private corporations and government entities for purposes of the privilege analysis. See Pet. App. 6a. It also fails to acknowledge that there already are many context-specific privileges recognized in federal and state law. Privileges often give way in the criminal context, in particular, in recognition of the paramount importance in criminal proceedings of obtaining relevant information. See *Nixon*, 418 U.S. at 708-713 & n.19; *Branzburg*, 408 U.S. at 688; *McCormick* § 104, at 388 (some States "deny the [physician] privilege in criminal cases generally, or in felony cases, or in cases of homicide").

²⁴ In *every* privilege case, the proponent argues that, in the absence of the privilege, important communications would be chilled—whether it be Presidential communications, information provided by reporters' sources, academic peer review discussions, state legislator discussions, or parent-child communications. In general, federal courts have concluded that they are ill-equipped to examine the relative merits of such claims. That is why courts generally look to background principles of judicial restraint and such objective criteria as the historical or contemporary support for a privilege. See *Branzburg*, 408 U.S. at 693-694 ("Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative."); Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 Sup.

Court has routinely rejected this kind of hypothesized effect as a basis for applying a privilege.²⁶ In addition, petitioner's chilling-effect contention—upon close examination—crumbles.

As has *always* been true, government employees and government lawyers understand that they do not control the ultimate assertion of privilege in any forum.²⁶ As a result, the government attorney and employee can have *no* expectation of confidentiality and *no* assurance that their communications or work product will remain confidential if called for in federal criminal proceedings. Moreover, as an historical matter, these common-law governmental "privileges" have rarely been asserted in federal grand jury proceedings, including in this investigation. Thus, government attorneys and employees necessarily know that their communications and work may be disclosed if relevant to a federal criminal investigation.²⁷

Ct. Rev. 309, 361 (tracing "web of effects" from privileges is a "stupefying complex task").

²⁵ See *Nixon*, 418 U.S. at 712 ("We cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for" in criminal proceedings.); *Branzburg*, 408 U.S. at 693 (rejecting privilege although "argument that the flow of news will be diminished * * * is not irrational"); see also *University of Pennsylvania*, 493 U.S. at 193 (accepting that "confidentiality is important to proper functioning of the peer review process" but rejecting chilling effect as basis for privilege).

²⁶ The individual who is President at the time the information is sought ultimately controls the privilege. See *CFTC v. Weintraub*, 471 U.S. 343, 349 & n.5 (1985) (common-law privilege for entities belongs to current management, not former management).

²⁷ Two other facts further undercut petitioner's argument. First, the prospect of disclosure to a grand jury does not present the same kind of chilling effect as public disclosure. See *Branzburg*, 408 U.S. at 700. Second, the overwhelming majority of White House business, and federal agency work, never comes under grand jury scrutiny. See *Nixon*, 418 U.S. at 712; cf. *Branzburg*, 408 U.S. at 691.

To be sure, when government employees who are witnesses in a federal grand jury investigation choose to communicate with other

Relying on the corporate privilege, however, petitioner further suggests that, absent a privilege, government agencies might be discouraged from conducting internal fact-finding and legal work that they perform to “promote broader public interests in the observance of law.” Pet. 22 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). But that argument ignores the fundamental distinction between private corporations and federal agencies. If there were no corporate privilege, corporations would be discouraged from conducting internal investigations because the facts developed could be subject to immediate disclosure to a federal grand jury, thereby exposing the corporation to criminal liability. That deterrent to gathering facts and performing legal work does not exist, however, in the governmental context. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States.²⁸ An agency cannot be adverse to the United States in a criminal prosecution.²⁹ When an agency becomes aware of internal wrong-

government employees (including government attorneys) about facts under active criminal investigation, the possibility of compelled disclosure to the grand jury is necessarily higher. That raises the question, however, whether communications in those circumstances should be protected. The district court stated that “[t]he issues in this case have been complicated somewhat by the manner in which the White House Counsel’s office has defined its area of responsibility.” Pet. App. 75a n.7. A governmental privilege that allows White House or other agency attorneys to receive information from grand jury witnesses and communicate that information to other witnesses—with all of those communications concealed from the grand jury—is dubious at best as a policy matter. See *Branzburg*, 408 U.S. at 696-697 (“[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. * * * Such conduct deserves no encomium.”).

²⁸ Petitioner suggests this conclusion would apply as well to an immunized witness, Pet. 17, but the analogy is inapt because an immunized witness can face criminal exposure for future crimes.

²⁹ See 4B Op. Off. Legal Counsel 749, 751 (1980) (“This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.”).

doing, the agency's interest is to ferret it out, and there can be no risk of endangering a *governmental* interest by doing so and by disclosing the results to federal law enforcement authorities. Cf. 28 U.S.C. 535(b).

5. The final gambit of would-be privilege proponents is to conjure up some middle-ground privilege that can be overcome only upon an undefined showing of need or heightened relevance. So it is that petitioner now sets forth such an alternative, Pet. 26-27, an option it did not see fit to advance in the courts below.

Any such approach would render enforcement of a grand jury subpoena contingent on a judicial finding—based on a variety of factors—that the grand jury has demonstrated some specific reason for disclosure (beyond relevance) that outweighs the agency's interest in confidentiality. Such a test would require the balancing of intangibles—the grand jury's need for information and the agency's need for confidentiality—in the context of a particular investigation, generating endless rounds of time-consuming skirmishing. This Court has consistently rebuffed efforts to require this sort of showing.⁸⁰ In this

⁸⁰ See, e.g., *R. Enterprises*, 498 U.S. at 298 (“grand jury proceedings should be free of such delays” that proposed multifactor test would cause); *Branzburg*, 408 U.S. at 704-705 (under proposed heightened relevance standard, “courts would * * * be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid”); see also *University of Pennsylvania*, 493 U.S. at 194 (requiring “a specific reason for disclosure * * * beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way”) (quotation omitted).

There also is no basis in *Nixon* for applying some heightened standard here. *Nixon* holds that even the *constitutional* Executive privilege for presidential communications yields in the face of the showing required to obtain evidence for criminal proceedings. See *United States v. Gillock*, 445 U.S. 360, 373 (1980) (Executive privilege does not “justify denying judicial power to secure all relevant evidence in a criminal proceeding”); *United States v. North*, 910 F.2d 843, 952 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part) (Court in *Nixon* “does not appear to have meant anything more than the showing that satisfied Rule 17(c)”).

case as well, the argument warrants rejection. As the parties have heretofore agreed, governmental attorney-client and work product privileges either are available in federal grand jury proceedings, or are not.

6. Petitioner suggests that common-law privilege claims by federal agencies normally would be resolved internally within the Executive Branch. Pet. 20-21 n.6. But the law of privileges, we submit, can have a substantial effect even on the internal negotiation process within the Executive Branch. It is much more difficult, as a practical matter, for the President to order a Justice Department prosecutor to withdraw a grand jury subpoena (or not to seek certain documents) than it is for the White House to claim reliance on a purported common-law privilege to refuse production of information to the Department. The well-reasoned decision of the court of appeals, and the important principle it reaffirms, should have a positive impact on the ability of the Justice Department to obtain relevant information from the White House in a variety of criminal investigations.³¹

³¹ As has been reported in various congressional proceedings, the White House has interposed privilege claims against the Justice Department on several occasions in the last few years. For example, the White House refused to allow Justice Department attorneys to review documents from Vincent Foster's office in the days after his death. That prompted former Deputy Attorney General Heymann, as he has testified publicly, to tell the White House Counsel that he was making a "terrible mistake," and that "you misused us." S. Rep. No. 104-280, at 68, 83 (1996). See also *id.* at 75 (Justice Department's Office of Professional Responsibility referring to "yet another example of the lack of cooperation * * * we received from the White House throughout our inquiry" on Travel Office matter); H.R. Rep. No. 104-849, at 152 (1996) (quoting memo by the head of the Justice Department's Public Integrity Section regarding Travel Office criminal investigation: "[T]he White House's incomplete production greatly concerns us because the integrity of our review is entirely dependent upon securing all relevant documents."). The House Report on the Travel Office matter states that the Justice Department's Public Integrity Section issued a grand jury subpoena to the White House in 1994, and that the White House in response claimed privilege as to 120 documents. H.R. Rep. No. 104-849, at 151-153.

III

The attorney-client privilege and work product doctrine are complementary protections that serve the client's interest in obtaining effective legal services. They stem from the same common-law source. The attorney-client privilege applies to communications between attorney and client; the work product doctrine provides qualified protection as well to factual and legal work that the attorney performs in preparing the client's case.

For the reasons stated, a *government* entity, unlike a private corporation, cannot maintain the two attorney-based protections in federal criminal proceedings. That fundamental proposition ends the case: The conclusion applies to both the attorney-client and work product issues. See, *e.g.*, Pet. App. 51a n.4 (Kopf, J., dissenting) (same analysis governs threshold question of existence of governmental attorney-client and work product doctrines in federal criminal proceedings).

IV

Were the Court to grant the petition and ultimately agree with petitioner that a government entity can maintain attorney-client and work product protections in federal criminal proceedings, two additional questions would be presented: whether the requirements of the attorney-client privilege are met under the facts of this case; and whether the requirements of the work product doctrine are met under the facts of this case. Petitioner cannot satisfy the requirements of either privilege, however, as we will briefly explain. See Sup. Ct. R. 15.2.

1. Assuming *arguendo* that a government agency can maintain a governmental attorney-client privilege in federal criminal proceedings, petitioner's privilege claim nonetheless fails. This is so for several reasons. First, because Mrs. Clinton is not a government officer or employee, she is not a representative of the client under *Upjohn*. Cf. *Association of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 911 (D.C. Cir. 1993) (First Lady, in official role as Chair of the Presi-

dent's Task Force on National Health Care Reform, was "officer or employee" for purposes of Federal Advisory Committee Act). Second, even if Mrs. Clinton is a government officer or employee, the privilege applies only to communications that "concerned matters within the scope of the employees' [governmental] duties." *Upjohn*, 449 U.S. at 394. The handling of the Rose Law Firm billing records and of documents from Mr. Foster's office did not involve governmental duties assigned to Mrs. Clinton.

Even if Mrs. Clinton is a client and the communications concerned matters within the scope of her official duties, the privilege claim still fails because the official meetings in question occurred in the presence of third parties—namely, Mrs. Clinton's personal attorneys. Although that fact would not defeat the privilege if Mrs. Clinton and the White House could satisfy the requirements of the so-called "common interest" exception to the no-third-party-presence requirement of the attorney-client privilege, they cannot do so here.

This Court has not considered whether there is a "common interest" exception to the traditional rule that attorney-client communications, to be privileged, must occur outside the presence of third parties. That is a highly important issue as to which the law is, in the main, underdeveloped. Courts have recognized the exception in two narrowly limited circumstances: (1) when two clients share the same attorney or (2) when two parties are co-defendants or co-plaintiffs in pending litigation. Neither situation exists here. Even if the Court assumed the common-interest exception applied to *anticipated* as well as pending litigation, see *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964), it would not be satisfied. At the meetings in question, the White House and Mrs. Clinton were not anticipating the possibility of future litigation in which they might be aligned as parties. The White House Office, as an agency, was not anticipating litigation at all. Moreover, a federal government agency does not possess an interest in common with an individual as *against* the United States in a

criminal investigation or prosecution. See 4B Op. Off. Legal Counsel 749, 751 (1980) (“This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.”).

2. Assuming *arguendo* that a government agency can maintain a governmental work product privilege in federal grand jury proceedings, that claim also fails. The work product doctrine covers work performed by an attorney “in anticipation of litigation.” The White House as an entity was not anticipating litigation. That ends the issue. Petitioner’s primary response is that congressional proceedings are equivalent to litigation. Pet. 27-29. But that argument has no case law support and contradicts the plain meaning of the term “litigation.” The work product doctrine is “grounded in the realities of litigation in our adversary system,” *United States v. Nobles*, 422 U.S. 225, 238 (1975), and simply does not apply to “[m]aterials assembled in the ordinary course of business, or pursuant to *public* requirements unrelated to litigation, or for other nonlitigation purposes,” Fed. R. Civ. P. 26 advisory committee’s note (emphases added).

V

Finally, we note a procedural point: The current caption of this case is directly contrary to the independent counsel statute, see 28 U.S.C. 594(a), and to this Court’s consistent practice.

The issue also plays itself out in the cauldron of trials. Opposing counsel at times prefer to label prosecutors as “the independent counsel” and to state or imply that the prosecutors do not represent the United States. In the 1996 trial of Jim Guy Tucker and the McDougals, Judge George Howard, Jr., put an end to gamesmanship of this sort in the presence of the jury during the examination of David L. Hale:

Mr. Collins (Tucker’s Attorney): If your Honor please, I said Independent Counsel; I didn’t say the United States, and I believe—

Mr. Jahn (Associate Independent Counsel): We are the United States, your Honor.

Mr. Collins: They are not. * * * [T]hey are Independent Counsel appointed under a special act. * * *

The Court: The indictment which was rendered by citizens of this state, the caption is United States of America versus James B. McDougal, Jim Guy Tucker, and Susan H. McDougal. Mr. Jahn and his associates represent the United States of America. Disregard the comment made by Mr. Collins. Go ahead.

United States v. McDougal, Tucker, and McDougal, No. LR-CR-95-173, Tr. 4525-4527 (E.D. Ark. Apr. 11, 1996).

The caption of this case, by referring to the "Office of Independent Counsel," directly contradicts Section 594(a) of Title 28. It is the law, not convention, which establishes that this Office, within its jurisdiction, possesses the full "authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General" and is responsible for "handling all aspects of any case, *in the name of the United States.*" 28 U.S.C. 594(a) (emphasis added).³² In addition, "[w]hen issuing * * * subpoenas, an independent counsel stands in the place of the Attorney General." S. Rep. No. 100-123, at 22 (1987); see 28 U.S.C. 594(a). The statutory language is supported by the consistent practice of this Court for over two decades of identifying the "United States" as the party in cases involving special prosecutors and independent counsels.³³

³² Under the statute, "the Attorney General or the Solicitor General" may "mak[e] a presentation as amicus curiae." 28 U.S.C. 597(b). But in such cases, the Independent Counsel still exercises authority, within his jurisdiction, "in the name of the United States." 28 U.S.C. 594(a) (9).

³³ See, e.g., *Tucker v. United States*, 117 S. Ct. 76 (1996); *Marks v. United States*, 117 S. Ct. 76 (1996); *Haley v. United States*, 117 S. Ct. 76 (1996); *Fitzhugh v. United States*, 117 S. Ct. 256 (1996);

Neither the governing statute nor this Court's practice admits of an exception when the other party before the Court is a separate entity within the Executive Branch. As to that issue, moreover, there is controlling precedent: *United States v. Nixon*.³⁴

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. If the Court grants the petition, we respectfully request that oral argument be scheduled expeditiously so that delay in the orderly progress of this sensitive criminal investigation is minimized.

Respectfully submitted.

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May 1997

United States v. Poindexter, 506 U.S. 1021 (1992); *North v. United States*, 500 U.S. 941 (1991); *United States v. Nofziger*, 493 U.S. 1003 (1989); *Poindexter, North, and Hakim v. United States*, 490 U.S. 1004 (1989); *Deaver v. United States*, 484 U.S. 829 (1987); *Mitchell and Haldeman v. United States*, 431 U.S. 933 (1977); *Ehrlichman v. United States*, 431 U.S. 933 (1977); *Barker v. United States*, 421 U.S. 1013 (1975); *United States v. Nixon*, 418 U.S. 683 (1974). In cases arising out of federal grand jury proceedings, moreover, the caption refers to federal government prosecutors as the "United States." See, e.g., *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991). In *Morrison v. Olson*, 487 U.S. 654 (1988), the question presented was *whether* the independent counsel did, and constitutionally could, represent the United States in the criminal investigation. There is no such question here.

³⁴ There, as here, the President asserted a governmental privilege in refusing to comply with a subpoena duces tecum during criminal proceedings.

APPENDIX

STATUTE AND RULE INVOLVED

Federal Rule of Evidence 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

28 U.S.C. 535(b) provides:

Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless—

- (1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or
- (2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

(1a)

No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES
IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the attorney-client privilege under Fed. R. Evid. 501 authorizes disclosure of information "whose relative importance is substantial" in federal criminal proceedings after the client's death.

2. Whether the work product doctrine authorizes disclosure of an attorney's notes of an interview with a witness who is deceased and therefore unavailable.

(i)

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States, represented in this criminal investigation by the Independent Counsel in re: Madison Guaranty Savings & Loan Association, *see* 28 U.S.C. § 594(a); James Hamilton; and the law firm Swidler & Berlin.

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BRIEF FOR THE UNITED STATES
IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals and a redacted version of the dissent are reported at 124 F.3d 230 and printed in full in Petitioners' Appendix (Pet. App. 1a-26a). The court's order on petition for rehearing is reported at 129 F.3d 637 (Pet. App. 27a-32a). The district court's two substantively identical opinions (one for each of the two subpoenas at issue) are unreported (Pet. App. 34a-42a and 44a-53a).

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1997. The court denied a petition for rehearing on November 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. On August 5, 1994, pursuant to the application of Attorney General Reno under 28 U.S.C. § 592(c), the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels (Special Division), appointed Kenneth W. Starr as Independent Counsel to represent the United States in investigating particular matters regarding President and Mrs. Clinton, Whitewater Development Corp., and Madison Guaranty Savings & Loan. *In re Madison Guaranty Savings & Loan Association* (D.C. Cir. Spec. Div. Aug. 5, 1994). In March and April 1996, acting under 28 U.S.C. §§ 593(c)(1) and 594(e), the Attorney General and the Special Division authorized the Office of the Independent Counsel to investigate whether particular individuals had made false statements or committed other federal crimes during various government investigations of the firings of White House Travel Office employees.

2. On May 19, 1993, the White House fired seven employees of the White House Travel Office. In response to criticism of the firings, the White House conducted an internal management review, issued a report, and reprimanded four White House officers and employees. On July 2, 1993, the Supplemental Appropriations Act of 1993, Pub. L. 103-50, was enacted, which required the General Accounting Office to review the firings.

3. On Sunday, July 11, 1993, James Hamilton, an attorney with the Washington, D.C., law firm of Swidler & Berlin, met with Deputy White House Counsel Vincent W. Foster, Jr. Mr. Foster, a former partner of Hillary Rodham Clinton's at the Rose Law Firm in Little Rock, Arkansas, had been involved in the process leading up to the Travel Office firings, although he had not been reprimanded. The July 11 conversation related to Mr. Hamilton's possible representation of Mr. Foster with respect to congressional or other investigations of the Travel Office matter. At the meeting, Mr. Hamilton took three pages of notes, which are at issue in this case. Pet. App. 31a.

On July 20, 1993, nine days after meeting with Mr. Hamilton, Mr. Foster was found dead in Fort Marcy Park in suburban Virginia. A series of official investigations ensued, all of which have concluded that Mr. Foster had killed himself by gunshot in Fort Marcy Park.

4. There is no dispute that Mr. Foster would have been an important witness in this Office's investigation of whether particular individuals made false statements or committed other federal crimes during investigations of the Travel Office firings. Because Mr. Foster is deceased, this Office has attempted, consistent with traditional and standard law enforcement practice, to obtain evidence of Mr. Foster's knowledge of the matter through any oral statements or writings he may have made. The notes taken by Mr. Hamilton during his meeting with Mr. Foster on July 11, 1993, regarding the Travel Office matter are highly relevant to this Office's investigation.

5. On December 4, 1995, at a time when this Office was investigating Mr. Foster's death, the grand jury

subpoenaed Mr. Hamilton's notes and other documents. Petitioners (Mr. Hamilton and his law firm, Swidler & Berlin) moved to quash or modify the subpoena. On order of the district court, Mr. Hamilton produced a privilege log on July 9, 1996. On July 16, 1996, this Office identified and sought various documents listed on that log, including the notes of the 1993 conversation with Mr. Foster. In resisting the subpoena, Mr. Hamilton argued, first, that the notes were protected by the attorney-client privilege, which he contended applies even after the client's death; and, second, that they were protected by the work product doctrine.

On December 16, 1996, the district court granted Mr. Hamilton's motion in relevant part without specifically addressing whether attorney-client privilege survives the death of the client. The court found the notes protected by the attorney-client privilege and work product doctrine.

6. This Office appealed, and the court of appeals reversed. The court noted that in the vast majority of cases addressing the issue—particularly those concerning testator's intent in a will dispute—courts have held the privilege inapplicable. Pet. App. 3a. The court also emphasized that most commentators have "supported some measure of post-death curtailment" of the privilege. Pet. App. 4a. The court pointed out that Wright & Graham have emphatically rejected the suggestion that the privilege should continue to apply after death. So, too, McCormick has argued that the privilege should not apply after death. The court also cited Mueller & Kirkpatrick, who likewise concluded that the privilege should not apply after death. Pet. App. 4a-5a. The court cited Learned Hand's argument that privilege

should not apply after death. Finally, the court pointed out that the American Law Institute, in the latest draft of the Restatement (Third) of the Law Governing Lawyers, had rejected a perpetual privilege. The court noted that the ALI had suggested "a general balancing test" under which "a tribunal be empowered to withhold the privilege of a person then deceased." Pet. App. 5a.

The court concluded: "The costs of protecting communications after death are high. Obviously the death removes the client as a direct source of information; indeed, his availability has been conventionally invoked as an explanation of why the privilege only slightly impairs access to truth." Pet. App. 7a. On the other side of the balance, the court found that "the risk of post-death revelation will typically trouble the client less" and that a post-death restriction of the privilege to the realm of criminal litigation will likely cause a chilling effect "fall[ing] somewhere between modest and nil." Pet. App. 6a-7a. The court also noted that the individual "may even view history's claims to truth as more deserving." Pet. App. 7a. Because criminal liability ceases at death, the court concluded that modifying the privilege solely in the realm of criminal litigation, and leaving it unaffected in civil litigation, would exert little if any chilling effect on attorney-client communications. *Id.* Following the approach advocated by the Restatement, the court thus defined a narrow, sharply bounded exception, limited (i) to *criminal* proceedings and (ii) to statements of particular importance: "the statements must bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence." Pet. App. 10a. The court remanded the case to the district court for application of this test to the notes at issue here.

Turning to the issue of work product, the court distinguished factual information contained in an attorney's notes of an interview with an unavailable witness from the attorney's own evaluations. The court stated that "[o]ur brief review of the documents reveals portions containing factual material" and therefore rejected the district court's conclusion. Pet. App. 14a.

Judge Tatel dissented solely on the question of attorney-client privilege, and "therefore [did] not consider whether the notes are attorney work product." Pet. App. 15a. The court of appeals denied petitioners' suggestion for rehearing en banc. Pet. App. 27a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Indeed, the decision of the court of appeals is the first federal decision addressing the question. The panel's decision comports with the vast majority of decided cases addressing the general question of whether attorney-client privilege fully survives the client's death. It closely tracks the virtually unanimous views advocated by the ALI, by commentators such as McCormick, Wright & Graham, Wolfram, Mueller & Kirkpatrick, and by legal luminaries such as Learned Hand.

Given the novelty of the issue in the federal courts of appeals, and the court of appeals' decision to carefully follow the body of law and commentary, review here is unwarranted, especially inasmuch as the case arises in the midst of an ongoing grand jury investigation.

Preliminarily, we take note of an important prudential consideration: This Court's review would further delay an important grand jury investigation which touches on vital matters of public concern. *The grand jury subpoena was issued over 26 months ago*, yet there still has not been a final judicial resolution. Delay of this magnitude seriously impedes a grand jury investigation. This Court's review—on a narrow issue of first impression with no circuit split—would cause further lengthy delays. Because “extended litigation” impedes the “orderly progress of an investigation,” *United States v. Calandra*, 414 U.S. 338, 349 (1974), and “frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws,” *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991), federal courts attempt to avoid the “protracted interruption of grand jury proceedings,” *Calandra*, 414 U.S. at 350.

The dictates of this Court's Rule 10 are clearly not met. There is no circuit split. The decision below does not conflict with any decision of the Supreme Court or any other federal court. Indeed, the decision is the *first* federal case addressing whether the attorney-client privilege applies in federal *criminal* proceedings after the client's death. As the dearth of case law suggests, the issue is exceedingly narrow, and the court of appeals' resolution of it will have no effect on attorney-client privilege in *civil* litigation. The novelty and the narrowness of the issue counsel hesitation before this Court exercises its discretionary certiorari jurisdiction.

1. Before this case, no federal court had ever had occasion to rule on whether the attorney-client priv-

ilege applies in federal criminal proceedings after the client's death. In attempting to manufacture an inter-circuit conflict, petitioners claim that the decision conflicts with two Ninth Circuit decisions. Pet. 10. Both of those decisions, however, are *civil* cases. The court of appeals in this case stated explicitly that its decision applies solely to *criminal* cases: "We reject a general balancing test in all but this narrow circumstance"—namely, "use in criminal proceedings after death of the client." Pet. App. 8a.

2. The court's decision accords with the vast majority of cases addressing whether the attorney-client privilege survives death outside the context of a federal criminal investigation. The question has arisen most frequently in state decisions. Almost all of the cases have involved disputes over a will. Pet. App. 3a (95% of cases raising the issue have been testamentary disputes). In these testamentary cases, state and federal courts have consistently held that the privilege does *not* survive death. *See id.* The operation of the attorney-client privilege thus has been "nullified in the class of cases where it would most often be asserted after death." *McCormick on Evidence* § 94, at 348 (4th ed. 1992); *see also* 2 Mueller & Kirkpatrick, *Federal Evidence* § 197, at 380 (2d ed. 1994) (privilege "inapplicable" in cases where the communications "are most likely to be sought"). The court's conclusion that the privilege does not automatically apply after the client's death in criminal proceedings follows *a fortiori* from the vast body of case law holding that the privilege does not apply after death in testamentary disputes. As this Court has stated, the need for evidence is "particularly applicable to grand jury proceedings." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). That conclusion

follows as well from the deeply rooted principle that an evidentiary privilege, which “obstructs the truth-finding process,” must be “narrowly construed.” Pet. App. 6a. Because the attorney-client privilege “has the effect of withholding relevant information from the factfinder, it applies only where *necessary* to achieve its purpose.” *Fisher v. United States*, 425 U.S. 391, 403 (1976) (emphasis added). Given that courts have consistently found that it is not necessary to apply the privilege after death in testamentary cases, it logically follows that it is not necessary to apply the privilege after death in criminal cases—circumstances which arise less frequently and present a far more compelling need for evidence.¹

In the state courts, only a handful of criminal cases have addressed this issue, with several concluding that the privilege does not apply after death. In *State v. Gause*, 489 P.2d 830 (Ariz. 1971), for ex-

¹ Petitioners suggest that any privilege must apply uniformly in all proceedings (civil and criminal), Pet. 11, but that argument flies in the face of settled law. Many privileges are applied in a context-specific manner and carry less weight in criminal proceedings than in other settings. They include, for example, the Executive privilege for Presidential communications, *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974); the governmental privilege for deliberative processes; the qualified reporter’s privilege; and the informer’s privilege.

Petitioners’ separate suggestion that privileges must be recognized to the same extent in state and federal court, Pet. 10, is likewise contrary to Supreme Court precedent. See *United States v. Gillock*, 445 U.S. 360, 368 (1980) (state evidentiary privilege “which Gillock could assert in a criminal prosecution in state court does not compel an analogous privilege in a federal prosecution”); *Trammel v. United States*, 445 U.S. 40, 49 (1980) (declining to recognize adverse spousal testimony privilege although 24 states did so).

ample, the defendant was found guilty of murdering his wife and was sentenced to death. The Arizona Supreme Court held that the attorney-client privilege did not require exclusion of statements made by the wife to her attorney before her death. A similar scenario was presented in *State v. Kump*, 301 P.2d 808 (Wyo. 1956). The Wyoming Supreme Court held the statements admissible, stating that “[w]e can conceive of no public policy which would exclude the communications such as are involved in this case.”² *Id.* at 815. Of the few civil cases outside the testamentary context, the only case with meaningful analysis concluded that the privilege does not survive death. *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976).

In sum, the cases that have actually decided this privilege issue overwhelmingly accord with the decision of the court of appeals. See Pet. App. 3a; see also Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Leg. Ethics 45, 58 n.65 (1992) (95% of cases arise in testamentary context, where privilege does not apply after death).

² In the three other state supreme court cases that have decided the issue, the courts held that the privilege applies after death, although there were dissents in two of those cases. See *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 72 (Mass. 1990) (Nolan, J., dissenting), advocating “limited exception to the privilege . . . where the interests of the client are so insignificant and the interests of justice in obtaining the information so compelling”; *State v. Macumber*, 544 P.2d 1084, 1088 (Ariz. 1976) (Holahan, J. and Cameron, C.J., dissenting) (“When the client died there was no chance of prosecution for other crimes Opposed to the property interest of the deceased client is the vital interest of the accused in this case in defending himself against the charge of first degree murder.”).

The court of appeals correctly found that “there is little by way of judicial holding that affirms the survival of the privilege after death.” Pet. App. 4a. Moreover, the “relatively rare” cases that “do actually apply it give little revelation of whatever reasoning may have explained the outcome.” Pet. App. 3a; *see also Frankel* at 57 n.63 (“only a few judicial opinions offer[] any extensive discussion”).³

3. The court of appeals decision follows the approach advocated by the American Law Institute and the vast majority of commentators. The Restatement of the Law Governing Lawyers states that allowing posthumous disclosure “would do little to inhibit clients from confiding in their lawyers.” Restatement (Third) of the Law Governing Lawyers § 127 comment d (March 29, 1996). McCormick opposed continuation of the privilege after death, stating: “[T]o hold that in all cases death terminates the privilege . . . could not in any substantial degree lessen the encouragement for free disclosure which

³ Petitioners suggest that several evidence codes have held the privilege applies after death in perpetuity. Pet. 13-14. That is incorrect, as the court of appeals explained. Pet. App. 4a n.2, 9a. To begin with, most codes addressing the issue contain a rule that the attorney-client privilege does not apply in testamentary disputes, the very situation in which the issue most often arises. Some state and model codes also indicate that the privilege may be asserted by the personal representative of the client, but as the court stated, “the framing of the posthumous privilege as belonging to the client’s estate or personal representative both suggests that the privilege may terminate on the winding up of the estate and reflects a primary focus on civil litigation.” Pet. App. 4a. These provisions thus say nothing about the appropriate rule in criminal proceedings in which, unlike in civil proceedings, neither the client nor the client’s estate is subject to liability.

is the purpose of the privilege." McCormick § 94, at 350. Learned Hand also opposed the privilege after death, saying that "a communicant who dies can have no more interests except in a remote way." 19 *ALI Proceedings*, 1942, at 143. The views of Mueller & Kirkpatrick are similar: "Few clients are much concerned with what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense." 2 Mueller & Kirkpatrick, *Federal Evidence* § 197, at 380. Wright & Graham concur, stating that "the typical client" would not have "much concern for how posterity may view his communications." 24 Wright & Graham, *Federal Practice and Procedure* § 5498, at 484 (1986). Wolfram also noted the oddity of holding that the privilege does not continue in testamentary cases but that it does in other cases. Wolfram, *Modern Legal Ethics* § 6.3.4, at 256 (1986).

4. The court of appeals decision carefully analyzes and accommodates the competing policy goals of (i) obtaining relevant evidence and (ii) protecting the traditional common-law privileged relationship. On the one hand, application of the privilege after the client's death would have far more serious consequences than application of the privilege before death. After a client's death, there will be "a loss of crucial information because the client is no longer available to be asked what he knows." 24 Wright & Graham § 5498, at 484; *see also* Wolfram at 256 (application after death "in effect gives an expanded scope to the privilege"). As the court of appeals reasoned, the death of the client thus not only eliminates a vital source of information; it also negates a longstanding justification for the attorney-client privilege: that

the client can be questioned directly about the relevant factual events. Pet. App. 7a.

On the other side of the ledger, the federal attorney-client privilege—which is not a constitutional command but a creature of federal rule—assures the client that certain communications to his attorney cannot be used in federal criminal or civil proceedings. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege thus tends to encourage full and frank communications from client to attorney and thereby furthers the policy of ensuring that clients receive effective legal advice. The court's decision does not dilute that policy, however, because the client no longer faces criminal liability after his death, when the communications would be disclosed. See Pet. App. 6a (“criminal liability will have ceased altogether”).

Petitioners respond that a client may be less forthcoming in communications to his attorney, even if assured that they cannot be used against him to impose criminal or civil liability, because of a fear that posthumous disclosure of his communications would adversely affect his reputation or interests of others about whom the client cares. Pet. 8, 15. This argument suffers from a fundamental flaw: The client's interest in his own reputation and in protecting friends and associates from liability cannot justify nondisclosure of information after death because it does not justify nondisclosure of information before death. When the client is alive, *he must testify truthfully as to all facts—regardless of how harmful those facts are to his reputation or to the interests of others.* See *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975) (“Testimony demanded of a witness

may be very private indeed”).⁴ And the client who testifies must disclose the same factual information that he disclosed to his attorney; the attorney cannot stand pat if the client commits perjury.⁵ After the client's death, the attorney simply would disclose the same factual information that the client himself would have disclosed had the client been alive. Given this reality, petitioners' argument based on reputation and protecting others has no more force with respect to post-death application of the privilege than it does with respect to the client's duty to testify truthfully when he is alive.

Moreover, the courts have rejected petitioners' chilling-effect argument in testamentary cases—the very situation where the communications disclosed are the most sensitive and personal imaginable. “Estate planning . . . may be based on considerations one would prefer never to reveal.” *Hitt v. Stephens*, 675 N.E.2d 275, 279 (Ill. App. 1997). For example, as the court noted here, “a decedent might want to provide for an illegitimate child but at the same time much prefer

⁴ The client can assert the Fifth Amendment privilege but only to protect himself from compelled self-incrimination, not to protect himself from embarrassment or to protect others. Moreover, the client who interposes the Fifth Amendment privilege can be immunized and then must testify truthfully as to all relevant facts.

⁵ See D.C. Rules of Professional Conduct 3.3(a)(4), (b); Model Rules of Professional Conduct 3.3(a)-(b) & comment 6 to Rule 3.3 (“an advocate must disclose the existence of the client's deception to the court or to the other party” except when client is criminal defendant). By communicating a particular version of facts to his attorney, the client essentially commits himself to that same version of facts if he subsequently testifies.

that the relationship go undisclosed.” Pet. App. 9a. The will-contest situation thus is “the one occasion *above all others* when a client is likely to be moved to silence in conversations with a lawyer if the client becomes aware that disclosures can be made after the client’s death.” Wolfram at 256 (emphasis added). Yet the courts have consistently held that the need to settle disputes over wills trumps any such interest in reputation or privacy, and that the attorney-client privilege does not apply after death in such cases.⁶

Furthermore, empirical support for petitioners’ argument is nonexistent. See Frankel at 61 (available empirical evidence “tells us little”); cf. *Branzburg*, 408 U.S. at 693-694 (rejecting First Amendment privilege claims where “[e]stimates of the inhibiting effect of such subpoenas . . . are widely divergent and to a great extent speculative”). Petitioners’ many suggestions that Mr. Foster would have wanted to conceal the truth of this matter are speculative at best. As the court of appeals stated, Mr. Foster, like others, might “view history’s claims to truth as more deserving.” Pet. App. 7a. Moreover, because the court’s decision is limited to the criminal context, cases where the situation will arise are so rare—as reflected in the fact that this is the first federal case ever litigated—that any hypothesized chilling effect would be minimal. See *id.* (“To the extent, then, that any post-death restriction of the

⁶ Petitioners attempt to explain those cases by suggesting that testators actually intended for attorney-client communications to be disclosed after death. Pet. 11. They are wrong. The court below and the commentators have correctly rejected that *post hoc* rationalization, for it is, in fact, highly unlikely that all testators actually intend that such communications be disclosed. See Pet. App. 9a; Wolfram at 256.

privilege can be confined to the realm of criminal litigation, we should expect the restriction's chilling effect to fall somewhere between modest and nil."); *cf. Nixon*, 418 U.S. at 712 ("we cannot conclude that advisers [to the President] will be moved to temper the candor of their remarks by the infrequent occasions of disclosure" in criminal proceedings). Even if there were a marginal chilling effect in certain cases, this Court has consistently concluded that a marginal chilling effect on a protected constitutional or common-law privilege is outweighed by the interest in obtaining relevant evidence for criminal proceedings.⁷

5. The implications of petitioners' position warrant brief mention. Those implications are best understood by examining the kinds of situations where the issue can arise and has arisen.

Suppose, for example, that a crime has occurred and that there are two suspects, one of whom is now deceased but had previously communicated to an attorney. That suspect's communications to the attorney could exculpate the still-living suspect. Under petitioners' approach, courts could not compel disclosure of that information—despite the manifest injustice that could result. *See State v. Macumber*, 544 P.2d 1084 (presenting those facts).

⁷ *See Nixon*, 418 U.S. at 712 (rejecting Executive privilege claim although Court acknowledges that the President and his advisers need to communicate confidentially); *Branzburg*, 408 U.S. at 693 (rejecting First Amendment privilege claim although "argument that the flow of news will be diminished . . . is not irrational"); *see also University of Pennsylvania v. EEOC*, 493 U.S. 182, 193 (1990) (rejecting First Amendment privilege claim although accepting that "confidentiality is important to proper functioning of the peer review process").

Similarly, a now-deceased witness might have observed the commission of a crime and discussed it with his attorney. Again, the information provided by the witness could exculpate or inculpate another person, but petitioners' absolutist approach nonetheless could prevent disclosure. *Cf. Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (presenting similar scenario in civil context).

Or a wife battered by her husband might recount to her attorney the husband's threats to her life. Under petitioners' approach, if the wife were then found beaten to death, the courts could not require disclosure of the information she had communicated to the attorney, despite the manifest injustice that could result. *See State v. Gause*, 489 P.2d 830; *State v. Kump*, 301 P.2d 808 (addressing issue on those facts).

No policy reason justifies these predictable results flowing from petitioners' desired culture of permanent secrecy. These examples of the severe harm that petitioners' proposed secrecy rule would generate illustrate powerfully why the vast majority of courts, the ALI, and respected commentators have rejected it.⁸

II

Petitioners also seek review on the work product issue. The court of appeals concluded that an attor-

⁸ Petitioners now, for the first time, apparently are willing to carve out exceptions *ad hoc* for various of these situations to make their drastic position more palatable. Pet. 11-12. But the many exceptions that petitioners allow do no more than expose the hollowness of their legal theory. The only coherent rationale justifying petitioners' tolerance of numerous "exceptions" is that they are not this case. That hardly is a persuasive position.

ney's notes of an interview with a deceased witness are not protected from disclosure under all circumstances. The federal courts of appeals that have addressed the issue have reached the same conclusion. See *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982); *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979) (requiring production of attorney memoranda of interview with deceased employee). Likewise, the Restatement provides that courts may order production of "notes in redacted form" when the "notes of an interview contain[] both the recollections of the witness and the thoughts of the lawyer who made the notes." Restatement § 138 comment c. Petitioners cite not a single case reaching the contrary conclusion, and their argument has no support in law or policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 97-1924

IN THE
Supreme Court of the United States
October Term, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM JEFFERSON CLINTON
and THE OFFICE OF THE PRESIDENT OF THE UNITED
STATES, RESPONDENTS

**PETITION FOR A WRIT OF CERTIORARI BEFORE
JUDGMENT TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Nixon*, 418 U.S. 683, 712-13 (1974), this Court held that the constitutionally based executive privilege for presidential communications “cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.” In addition, section 535(b) of title 28 requires that all Executive Branch officials expeditiously provide federal law enforcement authorities “[a]ny information” relating to possible federal criminal violations.

The questions presented are as follows:

1. Whether, in light of *Nixon*, executive privilege asserted by Counsel for the Office of the President authorizes President Clinton to prevent White House officials from testifying before a federal grand jury investigating possible federal crimes committed in connection with a private federal civil case.
2. Whether, in light of *Nixon* and § 535(b), a common-law governmental attorney-client or work product privilege authorizes President Clinton to prevent White House officials from testifying before a federal grand jury investigating possible federal crimes committed in connection with a private federal civil case.
3. [REDACTED].

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

(i) the United States of America, represented in this criminal investigation by the Office of Independent Counsel In re Madison Guaranty Savings & Loan Association, *see* 2 U.S.C. § 594(a)(9);

(ii) the Office of the President of the United States which has asserted executive privilege, government attorney-client privilege, and governmental work product protection; and

(iii) William Jefferson Clinton, who has asserted [REDACTED].

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REDACTED

No. 97-1924

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Supreme Court of the United States
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UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM JEFFERSON CLINTON
and THE OFFICE OF THE PRESIDENT OF THE UNITED
STATES, RESPONDENTS

**PETITION FOR A WRIT OF CERTIORARI BEFORE
JUDGMENT TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The United States of America, by Kenneth W. Starr, Independent Counsel, *see* 28 U.S.C. § 594(a)(9), petitions for a writ of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit. *See* Sup. Ct. R. 11; 28 U.S.C. §§ 1254(1), 2101(e).

OPINIONS BELOW

The district court's opinion and order entered May 4, 1998, granting the United States' motions to compel Bruce Lindsey and Sidney Blumenthal to testify (Pet. App. 1a, 34a), is not yet officially reported. The district court's opinion and order of May 26, 1998, granting in part and denying in part the motion for reconsideration by the President in his official capacity, is also not yet officially reported.

JURISDICTION

The order of the district court was entered on May 4, 1998, in *In re Grand Jury Proceedings* (D.D.C. Misc. Nos. 98-095, 98-096, and 98-097 (NHJ)). On May 11, 1998, the Office of the President filed motions for reconsideration of the district court's May 4, 1998, order as it applied to Messrs. Lindsey and Blumenthal. On May 13, 1998, William Jefferson Clinton and the Office of the President filed notices of appeal in Misc. Nos. 98-095 and 98-096. That same day, the certified record from the district court was docketed in the United States Court of Appeals for the District of Columbia Circuit (Nos. 98-3060, 98-3061, and 98-3062). On May 26, 1998, the district court denied the motions for reconsideration. On May 27, 1998, the court of appeals issued an order returning the consolidated appeals to the active docket. Pet. App. 37a. The jurisdiction of this Court to review the instant case, which is now pending in the court of appeals, *see Gay v. Ruff*, 292 U.S. 25, 30 (1934), is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

STATUTE AND RULES INVOLVED

The relevant portions of 28 U.S.C. § 535(b), Fed. R. Evid. 501, and Fed. R. Civ. P. 26(b)(3) are reproduced in the appendix.

STATEMENT

1. The district court granted motions filed by the United States, represented by the Office of the Independent Counsel ("OIC"), *see* 28 U.S.C. § 594(a)(9), seeking to compel the testimony of presidential aides Bruce Lindsey and Sidney Blumenthal before a federal grand jury sitting in the District of Columbia. The grand jury is investigating

to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses or otherwise violated federal law other than a Class B or Class C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*.

In re: Madison Guaranty Savings & Loan Association (D.C. Cir. Spec. Div. Jan. 16, 1998).

Monica Lewinsky is a former White House intern and employee of the White House's Office of Legislative Affairs. On December 5, 1997, President Clinton received notice that Monica Lewinsky's name was on a list of witnesses to be called by Paula Jones in the *Jones v. Clinton* litigation. On December 19, 1997, Ms. Lewinsky was served with a subpoena requiring her to testify at a deposition in the *Jones* case and to produce certain documents and other objects relating to contacts between her and President Clinton. On January 7, 1998, Ms. Lewinsky signed an affidavit representing under penalty of perjury that she had not had a sexual relationship with President Clinton.

2. On January 12, 1998, this Office received allegations relating to Ms. Lewinsky and the *Jones* case. The substance of these allegations was (i) that Ms. Lewinsky had had a sexual relationship with President Clinton; (ii) that a friend of the President had advised Ms. Lewinsky on how to respond to her subpoena in the *Jones* case, found an attorney to represent her, and helped her find a new job; and (iii) that Ms. Lewinsky had tried to persuade Linda Tripp, a witness in the *Jones* suit, to commit perjury in connection with that case.

These allegations related to the OIC's investigative jurisdiction in two ways. First, Linda Tripp has been a witness in several matters already within the OIC's jurisdiction, including the investigation into the death of Deputy White House Counsel Vincent W. Foster, Jr., the

handling of documents from Mr. Foster's office, and White House Travel Office matters. Second, the OIC was investigating — and continues to investigate — a number of large consulting payments made to Webster Hubbell, a witness in other matters within the OIC's jurisdiction. Some of those payments were arranged with the aid of an individual who helped Ms. Lewinsky obtain a job at a company that had also offered Mr. Hubbell a lucrative consulting contract.

After gathering preliminary evidence, the OIC reported to officials of the Department of Justice on January 15, 1998, and made the evidence available to them. On the following day, the Attorney General petitioned the Special Division, on an expedited basis, to expand the OIC's jurisdiction. At the Attorney General's request, the Special Division conferred jurisdiction on the OIC to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses or otherwise violated federal law" On January 17, 1998, President Clinton was deposed in connection with the *Jones* case, and was asked a number of specific questions about his relationship with Monica Lewinsky.

3. The Special Division's jurisdictional grant authorizes the Independent Counsel to investigate whether federal crimes may have been committed by Monica Lewinsky "or others" in connection with the *Jones* litigation. Pet. App. 11a. The testimony that the grand jury seeks from Messrs. Lindsey and Blumenthal "is likely to shed light on" this inquiry. *Id.* More specifically, as the district court explained,

If there were instructions from the President to obstruct justice or efforts to suborn perjury, such actions likely took the form of conversations involving the President's closest advisors, including Lindsey and Blumenthal. Additionally, if the President disclosed to a senior adviser that he committed perjury, suborned perjury, or obstructed justice, such a disclosure is not only unlikely to be recorded on paper, but it also would constitute some

of the most relevant and important evidence to the grand jury investigation.

Id.

4. a. On February 18, February 19, and March 12, 1998, Bruce Lindsey, Assistant to the President and Deputy Counsel, appeared before the grand jury in Washington, D.C. to testify. Mr. Lindsey asserted executive privilege (both in the form of a presidential communications privilege and a deliberative process privilege), governmental attorney-client privilege, governmental work product protection, [REDACTED] in refusing to answer a number of questions regarding Monica Lewinsky, the civil case *Jones v. Clinton*, and the Independent Counsel's investigation.

b. [REDACTED] asserted executive privilege in refusing to answer a number of questions that sought the substance of conversations regarding Monica Lewinsky, the civil case *Jones v. Clinton*, and the Independent Counsel's investigation.

c. On February 26, 1998, Sidney Blumenthal, Assistant to the President, appeared before the grand jury to testify. Mr. Blumenthal asserted executive privilege in refusing to answer a number of questions regarding Monica Lewinsky, the civil case *Jones v. Clinton*, and the Independent Counsel's investigation.

5. On March 6, 1998, the United States moved the district court to compel Bruce Lindsey (No. 98-095), Sidney Blumenthal (No. 98-096), and [REDACTED] (No. 98-097) to testify before the grand jury regarding the matters as to which they had asserted privileges. In addition to the individual grand jury witnesses, both the President in his personal capacity and the Office of the President opposed the United States' motions. Closed hearings on the motions were held before the district court on March 20 and 24, 1998.

6. In its opinion and order entered May 4, 1998, the district court granted the motions to compel Bruce Lindsey and Sidney Blumenthal to testify before the grand jury.¹

The district court began its executive privilege analysis by examining the nature of the testimony at issue. Finding that the conversations of Messrs. Lindsey and Blumenthal about the Lewinsky and *Jones* matters could be related at least in part to the President's official decisionmaking, the Court concluded that the subpoenaed testimony must be treated as presumptively privileged. Pet. App. 2a-3a (citing *Nixon*, 418 U.S. at 713).

The court went on to discuss the scope of the privilege for presidential communications, relying on *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997), for the proposition that the President need not personally participate in a communication among his advisers in order for the communication to be privileged. Applying this principle, the court concluded that, although the conversations at issue between Mr. Blumenthal and First Lady Hillary Rodham Clinton are within the privilege, those between Mr. Lindsey and a private individual are not. Pet. App. 6a-8a.

Relying on *United States v. Nixon*, 418 U.S. 683, and *In re Sealed Case*, 121 F.3d at 754, the district court next determined that "[t]he presumption of privilege may be rebutted by a sufficient showing of need by the Independent Counsel." Pet. App. 8a. This showing, the district court held, could be met by specifically demonstrating "'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.'" *Id.* at 9a (quoting *In re Sealed Case*, 121 F.3d at 754). The district court recognized that the first requirement "will not typically have

¹ In light of the Office of the President's representation that [REDACTED] would not assert executive or governmental attorney-client privilege in any future questioning before the grand jury, the Court denied the motion to compel [REDACTED] to testify as moot.

much impact because Federal Rule of Criminal Procedure 17(c) already limits a subpoena to relevant information.” *Id.* As to the second, the district court quoted the D.C. Circuit’s conclusion that the standard will be “easily” satisfied when “an immediate White House advisor is being investigated for criminal behavior.” *Id.* (quoting *In re Sealed Case*, 121 F.3d at 755). Applying this standard to the United States’ *in camera* need submission, the court determined that executive privilege did not justify nondisclosure in this case, and that the United States’ motion to compel would therefore be granted with respect to Messrs. Lindsey and Blumenthal. *Id.* at 10a-12a.

[REDACTED]

The district court then considered the President’s claims of governmental attorney-client privilege with respect to Mr. Lindsey. Drawing on reasoning from both the majority opinion and the dissent in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 926-27 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997), the district court concluded that any governmental attorney-client privilege must yield when a showing sufficient to meet the executive privilege standard had been made. Pet. App. 27a. In light of the United States’ *in camera* need submission, the Court determined that this standard had been met. *Id.* at 27a-31a.

Finally, the district court held that the governmental work product doctrine did not apply to interviews with grand jury witnesses or their counsel conducted by Mr. Lindsey, because such interviews were not conducted in anticipation of litigation involving the Office of the President. *Id.* at 31a-33a.

7. On May 11, 1998, the Office of the President filed motions for reconsideration of the district court’s May 4, 1998, order as it applied to Messrs. Lindsey and Blumenthal. On May 13, 1998, while the motions for reconsideration were still pending, William Jefferson Clinton and the Office of the President filed notices of appeal in Misc. Nos. 98-095 and 98-096. On May 14, the United States filed a corresponding

motion in the D.C. Circuit to dismiss these appeals for lack of appellate jurisdiction. On May 21, the D.C. Circuit entered an order consolidating the appeals, and directing that they “be held in abeyance pending the district court’s disposition of the motions for reconsideration pending before it in the underlying cases.” Pet. App. 35a-36a. On May 26, 1998, the district court entered an order granting in part and denying in part the motions for reconsideration. On May 27, 1998, the D.C. Circuit entered an order dismissing the United States’ motion to dismiss as moot and ordering that the consolidated appeals be returned to the active docket. *Id.* at 37a. The United States now seeks certiorari before judgment.

REASONS FOR GRANTING THE WRIT

1. This case is of high moment. It is strongly in the Nation’s interest that the case be resolved quickly so that the grand jury’s investigation can move forward at the earliest practicable date. If the decision below were to proceed through the normal processes of appellate review, important portions of this investigation would be substantially delayed. The need for expedition of this aspect of the United States’ investigation has been widely acknowledged, including by respondents.

This case presents a direct challenge by the Office of the President to the ability of a federal grand jury to obtain relevant evidence of possible criminal activity by Executive Branch officials. In cases presenting issues of similar significance, this Court has granted a writ of certiorari before final judgment in the court of appeals “because of the public importance of the issues presented and the need for their prompt resolution.” *United States v. Nixon*, 418 U.S. 683, 687 (1974); *see, e.g., Mistretta v. United States*, 488 U.S. 361, 371 (1989); *Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.

579, 584 (1952); *United States v. United Mine Workers*, 330 U.S. 258, 269 (1947); *see also* Sup. Ct. R. 11.

Immediate consideration by this Court would not sacrifice any benefits of intermediate appellate review. The Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the Eighth Circuit have heretofore considered and ruled on the main legal issues presented for review. *See In re Sealed Case*, 121 F.3d 729; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910. In addition, the district court's opinion thoroughly analyzes the relevant issues.

2. The principal legal issues in this case are resolved either directly or by necessary inference from this Court's decision in *United States v. Nixon*. But the President disagrees. As with *Nixon*, therefore, this case is exceedingly important.

In particular, because the President has invoked executive privilege to prevent Messrs. Lindsey and Blumenthal from testifying, this litigation involves fundamental constitutional issues arising out of the doctrine of separation of powers. The invocation of executive and other privileges in this context also presents a question of overriding concern to the full and impartial administration of justice: the circumstances under which the Executive Branch may withhold information from a federal grand jury investigating allegations of misconduct against the President, other Executive Branch officials, and various private individuals.

3. In *United States v. Nixon*, this Court held that the applicability of executive privilege turns on the nature of the proceeding and the substance of the information sought. 418 U.S. at 703-16. "Absent a claim of need to protect military, diplomatic, or sensitive national security secrets," the President's "generalized interest in confidentiality . . . cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 706, 713. Thus, in a criminal investigation, executive privilege simply does not justify withholding of information outside the realm

of documents or communications that implicate military, diplomatic, or sensitive national security secrets.

The Office of the President has previously argued that, notwithstanding *Nixon*, the prosecutor and grand jury cannot obtain relevant information from the Office of the President without demonstrating a critical need for the information. The standard proposed by the Office of the President is flatly inconsistent with the decision in *Nixon*. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 919 n.9 (8th Cir. 1997); *United States v. North*, 910 F.2d 843, 951-92 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part); cf. *In re Sealed Case*, 121 F.3d at 754-62 (rejecting standard that information be “critical to an accurate judicial determination,” but adopting heightened standard of relevance for grand jury investigation of non-White House officials). In any event, any standard of heightened relevance is abundantly satisfied on the facts of this case, as the district court correctly concluded. See Pet. App. 10a-12a.

The executive privilege claim in this case also fails at a more basic and threshold point. Under *Nixon*, executive privilege applies only to conduct and communications made in furtherance of a President’s Article II duties. See *Nixon*, 418 U.S. at 705-06. Executive privilege is, by its nature, a governmental privilege that stems from the President’s powers under Article II. It cannot and should not be asserted to deny the grand jury evidence of communications about private conduct, particularly in the absence of a showing that the communications about private conduct were in furtherance of a specified Article II function. See *Clinton v. Jones*, 117 S. Ct. 1636, 1639-44 (1997). The communications at issue in this case — discussions relating to or arising out of a private civil case involving the President in his personal capacity — fall outside that ambit.

4. The Office of the President also has advanced claims of governmental attorney-client and work product privilege. The Office of President contends that it can assert such privileges against a federal grand jury to the same extent

as a corporation. No constitutional provision, statute, rule, regulation, or case supports that bold assertion. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (rejecting argument); Pet. App. 18a-26a (same). But the Office of the President has refused to acquiesce, persisting month after month in resisting grand jury subpoenas on this basis.

These common-law privilege claims are flawed for at least two reasons. First, Congress has spoken. Section 535(b) of title 28 requires that “[a]ny information, allegation, or complaint received in a department or agency of the executive branch” be “expeditiously reported” to the Attorney General or other designated official. Section 535(b) trumps any common-law privilege asserted under Rule 501. See Fed. R. Evid. 501 (federal courts do not have authority to recognize common-law privileges that would be inconsistent with federal statutes). Second, even apart from § 535(b), this Court’s decision in *Nixon* contravenes any governmental attorney-client privilege in federal grand jury proceedings. In *Nixon*, the executive privilege for presidential communications — a privilege that is constitutionally based, historically rooted, and “fundamental to the operation of Government,” 418 U.S. at 708 — was overcome by the need for relevant evidence in criminal proceedings. It is untenable to say that communications that fall within the executive privilege are *less* worthy of protection in criminal proceedings than are communications between a government employee and government attorney. The district court correctly concluded that a governmental attorney-client or work product privilege can be no broader than executive privilege. [FOOTNOTE REDACTED]

5. [REDACTED].

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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May 28, 1998

No. 97-1924

IN THE
Supreme Court of the United States
October Term, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM JEFFERSON CLINTON
and
THE OFFICE OF THE PRESIDENT OF THE UNITED
STATES, RESPONDENTS

**PETITION FOR A WRIT OF CERTIORARI BEFORE
JUDGMENT TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITIONER'S REDACTED APPENDIX

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**MISC. ACTION NOS. 98-095,
98-096 & 98-097 (NHJ)**

IN RE GRAND JURY PROCEEDINGS

**FILED
MAY 27 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT**

REDACTED VERSION

MEMORANDUM OPINION

Before this Court are the Independent Counsel's motions to compel three witnesses to comply with their grand jury subpoenas. Witnesses Bruce Lindsey and Sidney Blumenthal have refused to answer certain questions propounded to them before the grand jury on the basis of executive privilege and Lindsey has refused to answer certain questions based upon the [REDACTED], governmental attorney-client privilege, and governmental work product protection. The attorney for the White House represented to the Court at a hearing on this matter that there were no questions as to which the third witness, [REDACTED], would assert the executive privilege or the attorney-client privilege. The Court will therefore deny the Independent Counsel's motion to compel [REDACTED] testimony as moot.

With respect to the remaining witnesses, the Court will first address their mutual claim of executive privilege.

[REDACTED] Lastly, the Court will consider Lindsey's claim of governmental attorney-client privilege and work product protection.

I. Analysis

A. Executive Privilege

The OIC has moved to compel the testimony of Lindsey and Blumenthal, two of President Clinton's senior advisers. The President has asserted that the executive privilege, also known as the presidential communications privilege, protects conversations involving himself, Lindsey and Blumenthal, and top White House aides. The presidential communications privilege is a governmental privilege intended to promote candid communications between the President and his advisors concerning the exercise of his Article II duties. *United States v. Nixon*, 418 U.S. 683, 705, 708, 711 (1974); *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997) (the "Espy case"). This Circuit has recognized a "great public interest" in preserving "the confidentiality of conversations that take place in the President's performance of his official duties" because such confidentiality is necessary in order to protect "the effectiveness of the executive decision-making process." *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973); *In re Sealed Case*, 121 F.3d at 742. Courts have recognized that the President "occupies a unique position in the constitutional scheme," *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), and that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." *Nixon*, 418 U.S. at 708 (quoting *United States v. Burr*, 25 F.Cas. 187, 192 (No. 14,694) (C.C.D.Va 1807)).

1. The Presumption of Privilege

The White House argues that the communications of Lindsey and Blumenthal are presumptively privileged because President Clinton has invoked executive privilege. The OIC counters that the communications are not privileged because the executive privilege applies only to communications

regarding official presidential matters and the federal grand jury investigation regarding Monica Lewinsky and the Paula Jones litigation are private matters. In light of the holdings of the United States Supreme Court and the Court of Appeals for the District of Columbia Circuit, this Court finds that it has a duty to treat the subpoenaed testimony of Lindsey and Blumenthal as presumptively privileged. *See Nixon*, 418 U.S. at 713; *In re Sealed Case*, 121 F.3d at 743.

Prompted by the Watergate investigation, the Supreme Court held that when the President of the United States asserts a claim of executive privilege, the district court has a "duty to . . . treat the subpoenaed material as *presumptively privileged*." *Nixon*, 418 U.S. at 713 (emphasis added). The D.C. Circuit recently reiterated this holding when it considered President Clinton's assertion of the executive privilege in the context of a federal grand jury investigation of Michael Espy, former Secretary of Agriculture. *In re Sealed Case*, 121 F.3d at 743. The D.C. Circuit wrote: "The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged." *Id.* at 744. In the Espy case, the D.C. Circuit treated the executive communications at issue as presumptively privileged just as it had done in earlier cases involving President Nixon's assertions of executive privilege. *Id.* at 743; *see Sirica*, 487 F.2d at 717; *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 730 (1974) ("Presidential conversations are 'presumptively privileged,' even from the limited intrusion represented by *in camera* examination of the conversations by a Court."). The presumptive privilege for executive communications "embodies a strong presumption, and not merely a lip-service reference." *Dellums v. Powell*, 561 F.2d 242, 246 (D.C. Cir.), *cert. denied*, 434 U.S. 880 (1977).

No court has ever declined to treat executive communications as presumptively privileged on the grounds

that the matters discussed involved private conduct. In fact, in the Nixon cases, the D.C. Circuit and the Supreme Court treated President Nixon's executive communications with his aides as presumptively privileged even though they involved the President's alleged criminal involvement in a break-in at the Democratic National Committee headquarters and its subsequent cover-up. *See Nixon*, 418 U.S. at 708; *Sirica*, 487 F.2d at 717; *Senate Select*, 498 F.2d at 730. In *Senate Select*, the subpoena explicitly directed President Nixon to give Congress taped conversations between himself and John Dean that "discuss[ed] alleged criminal acts occurring in connection with the Presidential election of 1972." 498 F.2d at 727. The D.C. Circuit not only presumed that the conversations were privileged, but also stated that the showing of need required to overcome the presumption "turned, not on the nature of the presidential conduct that the subpoenaed material might reveal, but instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment." *Id.* at 730. In other words, the nature of the presidential conduct at issue, whether it was official or private, appeared not to affect the presumption of privilege or the need stage of the D.C. Circuit's executive privilege analysis.

Purely private conversations that did not touch on any aspect of the President's official duties or relate in some manner to presidential decision-making would not properly fall within the executive privilege.¹ However, the President does need to address personal matters in the context of his

¹ *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977) (noting that the privilege is "limited to communications 'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions'"); *In re Sealed Case*, 121 F.3d at 752 ("Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters.").

official decisions. The position that nothing the President or his advisors could say to each other regarding the grand jury investigation or the *Jones* litigation would relate to the President's official duties is oversimplified. Indeed, the Independent Counsel has conceded that certain executive communications, such as those discussing how the President should respond to the Lewinsky matter during Tony Blair's visit, are protected by the executive privilege. 3/20/98 Tr. at 61-62.

At this stage, the Court has no evidence that Lindsey and Blumenthal's conversations discussing the Lewinsky and Jones matters were not related in some way to official decision making. To the contrary, the Court has [REDACTED] sworn affidavits asserting that the conversations at issue involved official matters such as possible impeachment proceedings, domestic and foreign policy matters, and assertions of official privileges.² The Office of the President submitted the affidavits "to establish as a factual matter that the communications in the White House over which executive privilege was being asserted related to official matters and official conduct." 3/20/98 Tr. at 43. The grand jury transcripts provided to the Court do not indicate that the witnesses refused to answer questions regarding conversations that did not relate to the President's official duties. The Court will not speculate that conversations among the President and his advisors fell outside of the President's Article II responsibilities.

The Court does not have documents or tapes to review *in camera* that could establish whether the content of the subpoenaed communications relates only to private matters, nor does it know how Lindsey and Blumenthal might answer the grand jury's questions. The Court is aware of only the unanswered questions themselves. Furthermore, unlike the *Espy* case, the subpoenas here call for testimony, not

² Declaration of Charles F.C. Ruff at ¶¶19-28; [REDACTED].

documents that the Court could review *in camera*. The Court's ability to assess whether the subpoenaed materials relate to official decisions is thus greatly hindered. This Circuit has stated

[A]ny court completely in the dark as to what Presidential files contain is duty bound to respect "the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article." For "a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual,'" and "(i)t is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice." [T]here is a presumption of privilege which can only be overcome by some demonstration of need.

United States v. Halderman, 559 F.2d 31, 76 (D.C. Cir. 1976) (footnotes omitted), *cert. denied sub. nom Ehrlichman v. United States*, 431 U.S. 933 (1977).

Under *Nixon*, the Court has a duty to treat the subpoenaed testimony as presumptively privileged. 418 U.S. at 713. In light of this binding precedent, the factual similarities between the Nixon cases and the case at hand, and the evidence submitted with respect to the President's invocation of privilege, this Court finds that it must treat the communications of Lindsey and Blumenthal as presumptively privileged.

2. *The Scope of the Privilege*

Although the Court must presume that presidential communications are privileged, the scope of the privilege is limited to "communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the

communications relate.” *In re Sealed Case*, 121 F.3d at 752. In other words, the President does not have to participate personally in the communication in order for it to be privileged.

Citing the presidential communications privilege, Lindsey refused to answer questions before the grand jury regarding a conversation he had with [REDACTED]. The White House did not mention [REDACTED] in its brief or at the hearings before this Court, much less argue that [REDACTED] is a presidential adviser. At any rate, the White House has not met its burden of showing that [REDACTED] communications with Lindsey “occurred in conjunction with the process of advising the President.” *Id.* Accordingly, the Court finds that any conversations between Lindsey and [REDACTED] are not covered by the executive privilege.

Both Lindsey and Blumenthal refused to answer questions before the grand jury regarding conversations they had with the First Lady, citing executive privilege. [REDACTED] states: “The First Lady functions as a senior adviser to the President, and it was in that capacity that I had discussions with her about the Independent Counsel’s investigation.” [REDACTED] At the hearing on this matter, in response to a question from the Court, the attorney for the White House argued that First Ladies have traditionally held a position of senior adviser to the President and cited *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993). The OIC has not contested that Mrs. Clinton would be covered by the executive privilege.

In *Association of American Physicians & Surgeons*, the D.C. Circuit faced the question of whether Mrs. Clinton was an “officer or employee of the government” for purposes of the Federal Advisory Committee Act (“FACA”). *Id.* at 902. Mrs. Clinton chaired the President’s Task Force on National Health Care Reform (“Task Force”), which was to advise the President and make recommendations to him. The issue

before the D.C. Circuit was whether the Task Force qualified for an exemption from FACA as an advisory group whose members were all officers and employees of the government. Rather than decide the constitutional question of whether the application of FACA would unconstitutionally interfere with the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art II, § 3, the court decided that Mrs. Clinton was an officer or employee of the government under FACA. 997 F.2d at 911. In the D.C. Circuit's discussion of the constitutional question, the court stated: "This Article II right to confidential communications attaches not only to direct communications with the President, but also to discussions between his senior advisers [I]f the President seeks advice from those closest to him, whether in or out of government, the President's spouse, typically, would be regarded as among those closest advisers." *Id.* at 909-10.

Mrs. Clinton is widely seen as an advisor to the President and "Congress itself has recognized that the President's spouse acts as the functional equivalent of an assistant to the President." *Id.* at 904 (citing 3 U.S.C. § 105(e)). The Court finds that conversations between the First Lady and Lindsey or Blumenthal fall under the executive privilege.

3. *OIC's Showing of Need*

The presumptive executive privilege is not absolute. *Sirica*, 487 F.2d at 716. The Court will not accept the President's "mere assertion of privilege as sufficient to overcome the need of the party subpoenaing the [testimony]." *Id.* at 713. The presumption of privilege may be rebutted by a sufficient showing of need by the Independent Counsel.³ *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997).

In deciding what showing of need is sufficient to overcome an assertion of the executive privilege, the D.C. Circuit looked to the need analyses established in the cases

³ See *Nixon*, 418 U.S. at 713; *In re Sealed Case*, 121 F.3d at 742; *Dellums*, 561 F.2d at 249; *Senate Select*, 498 F.2d at 730.

involving President Nixon and the Watergate investigation. *Id.* at 753.⁴ The court found that these cases “balanced the public interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *Id.* Working from the Supreme Court’s rather vague requirement of a “demonstrated, specific need for evidence,” *Nixon*, 418 U.S. at 713, the D.C. Circuit concluded that in order to overcome an assertion of executive privilege, the OIC must show “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 at 754. These elements must be shown “with specificity.” *Id.* at 756. The information sought need not be “critical to an accurate judicial determination.” *Id.* at 754.

The first requirement means that the evidence being sought must be “directly relevant to the issues that are expected to be central to the trial.” *Id.* The D.C. Circuit noted that this requirement will not typically have much impact because Federal Rule of Criminal Procedure 17(c) already limits a subpoena to relevant information. With respect to the second requirement, the party seeking to overcome the privilege should first attempt to determine whether sufficient evidence could be obtained elsewhere. *Id.* at 755. The issuer of the subpoena “should be prepared to detail these efforts and explain why evidence covered by the presidential privilege is still needed.” *Id.* The Court of Appeals has noted:

there will be instances where such privileged evidence will be particularly useful, as when, unlike the situation here, an immediate White House advisor is being investigated for criminal behavior. In such situations, the subpoena proponent will be able easily to explain why there is no equivalent to

⁴ The D.C. Circuit examined the need analyses established in *Nixon*, 418 U.S. at 713; *Sirica*, 487 F.2d at 716; and *Senate Select*, 498 F.2d at 731.

evidence likely contained in the subpoenaed materials.

Id. The court also foresaw that “a grand jury will often be able to specify its need for withheld evidence in reasonable detail based on information obtained from other sources.” *Id.* at 757. Finally, if the grand jury finds it difficult to obtain evidence from other sources, “this fact in and of itself will go far toward satisfying the need requirement.” *Id.*

If a “demonstrated, specific need” is shown, then the subpoenaed testimony shall be given to the grand jury unless there is “no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury’s investigation.” *United States v. R. Enterprises*, 498 U.S. 292, 300 (1991). “The question of what evidence might reasonably be relevant to the grand jury’s investigation should be answered by reference to the reasons the grand jury gave in explaining its need for the subpoenaed materials.” *In re Sealed Case*, 121 F.3d at 759.

The Court ordered the OIC to make a showing of need and the OIC made an extensive *ex parte* submission to the Court on that subject, which the Court has reviewed *in camera*. The submission surveys a substantial portion of the evidence gathered by the grand jury during the OIC’s investigation to provide background for the OIC’s explanation of why certain inquiries must be directed to the White House and the President’s closest advisers. The OIC attaches portions of the grand jury testimony of Lindsey⁵ and Blumenthal that highlight the questions they declined to answer on the basis of executive privilege.

In general, Lindsey declined to answer questions relating to [REDACTED]. He also declined to discuss [REDACTED]. Blumenthal declined to answer questions relating to

⁵ Upon the motion of Lindsey, the Court has reviewed the transcript of his complete grand jury testimony as well.

[REDACTED]. The submission delineates nineteen categories of information it seeks from Lindsey and three categories of information it seeks from Blumenthal and describes how each category meets the *In re Sealed Case* need standard.

Because the Court has reviewed the documents *in camera* and most, if not all, of those documents are protected by Federal Rule of Criminal Procedure 6(e)(2), its finding of need cannot be detailed. *See id.* at 740. The Court cannot describe the categories of evidence needed in any more detail than it has already because doing so would reveal “matters occurring before the grand jury.” *See* Federal Rule of Civil Procedure 6(e)(2). The Court finds that the categories of testimony sought by the OIC from Lindsey and Blumenthal are all likely to contain relevant evidence that is important to the grand jury’s investigation. *In re Sealed Case*, 121 F.3d at 754. The OIC has been authorized to investigate whether Monica Lewinsky “or others,” including President Clinton, suborned perjury, obstructed justice, or tampered with witnesses. Order of the Special Division, Jan. 16, 1998. The testimony sought and withheld based on executive privilege is likely to shed light on that inquiry, whether exculpatory or inculpatory. *In re Sealed Case*, 121 F.3d at 754.

In addition, [REDACTED]. If there were instructions from the President to obstruct justice or efforts to suborn perjury, such actions likely took the form of conversations involving the President’s closest advisors, including Lindsey and Blumenthal. Additionally, if the President disclosed to a senior adviser that he committed perjury, suborned perjury, or obstructed justice, such a disclosure is not only unlikely to be recorded on paper, but it also would constitute some of the most relevant and important evidence to the grand jury investigation. The D.C. Circuit noted that if a crime being investigated by the grand jury relates to “the content of certain conversations,” then the grand jury’s need for the exact text of those conversations is “undeniable.” *Id.* at 761 (quoting *Senate Select*, 498 U.S. at 732) (emphasis added).

The Court also finds that the OIC has met its burden of showing with specificity that the evidence is not available with due diligence elsewhere. *See id.* at 754. The OIC seeks testimony regarding conversations that took place within the White House and the only sources of that testimony are those persons participating in the conversations. Further, the OIC presented the Court with detailed information about its unsuccessful efforts to obtain this evidence through other sources. The OIC has diligently pursued other alternatives where feasible.⁶ [REDACTED]

In sum, the OIC has provided a substantial factual showing to demonstrate its “specific need” for the testimony. *Nixon*, 418 U.S. at 713. The Court finds that the evidence covered by the presumptive privilege remains necessary to the grand jury and cannot feasibly be obtained elsewhere. The Court will grant the OIC’s motions to compel the testimony of Lindsey and Blumenthal insofar as they have asserted executive privilege.

B. [REDACTED]

C. *Official Attorney-Client Privilege and Work Product Protection*

Lindsey has asserted an absolute governmental attorney-client privilege in response to grand jury questions concerning his communications with the President, members of the White House Counsel’s Office, grand jury witnesses or their

⁶ The White House claims to have offered to permit non-attorney advisors such as Blumenthal to testify as to *factual* information in executive communications but refuses to permit them to disclose strategic deliberations. However, the White House fails to establish the parameters of factual and strategic matters and the Court finds it difficult to discern in advance whether communications are strategic or factual. For example, if directions were given to obstruct justice in some fashion, such directions could constitute a strategic decision but could also be characterized as a factual event. Not only was the White House offer ambiguous, but there is also some question as to whether it was a firm offer. Given the ambiguity of the offer, the Court declines to factor it into its decision.

attorneys, and the President's personal attorneys. The attorney-client privilege protects communications from clients to their attorneys that were intended to be confidential and were made for the purpose of obtaining legal advice. *See Tax Analysts*, 117 F.3d at 618. Communications from attorneys to their clients are also protected if the communications "rest on confidential information obtained from the client." *Id.* (citation omitted). Lindsey claims to have performed legal services as Deputy Counsel to the President for his client, the Office of the President. He has "advis[ed] the Office of the President on whether the President should assert his official privileges to protect the communications at issue here from compelled disclosure, and gather[ed] the facts needed to reach a recommendation on that question" White House's Mem. Concerning President Clinton's Suppl. Filing in Support of Opp. to Mot. to Compel Testimony of Bruce Lindsey at 2. In addition, Lindsey has gathered information including talking to grand jury witnesses or their attorneys in order to provide legal advice to the Office of the President with respect to potential impeachment proceedings.

Lindsey also asserts an absolute governmental attorney-client privilege with respect to advice he rendered to the Office of the President on "how best to prevent other litigation in which the President is involved from hampering the Presidency's fulfillment of its institutional duties." *Id.* To the Court's knowledge, the only "other litigation in which the President is involved" is the Paula Jones suit. Additionally, Lindsey asserts the governmental privilege with respect to his communications with the President's personal attorneys pursuant to the common interest doctrine. He claims that the Office of the President and the President as an individual share certain common interests that permitted confidential communications between the Office of the White House Counsel and the President's personal attorneys. Lastly, Lindsey has asserted the governmental work product doctrine in response to questions regarding his interviews with grand jury witnesses and their counsel.

1. *The Attorney-Client Privilege in the Federal Grand Jury Context*

The White House asks the Court to recognize an absolute governmental attorney-client privilege in the context of a federal grand jury investigation of an official's alleged private misconduct. The OIC argues that no such privilege should exist in this context.

The Court begins by noting that privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 710. Privileges should be recognized "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citations omitted). When deciding whether to recognize asserted privileges, courts are instructed by Federal Rule of Evidence 501 to interpret the common law privileges "in the light of reason and experience." Pursuant to Rule 501, this Court must determine whether the asserted privilege has any history of being applied under the circumstances here, and if not, whether applying such a privilege would serve some important public interest.

Only two Courts of Appeal have addressed the issue of whether a governmental attorney-client privilege can be asserted in response to a federal grand jury subpoena. The Sixth Circuit explained that it has assumed that a governmental attorney-client privilege exists but has "never explicitly so decided." *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998); *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989). Neither Sixth Circuit case decided that a governmental attorney-client privilege exists and neither case involved an investigation of a government official's private conduct; both cases challenged official government conduct.

The Eighth Circuit case, by contrast, did involve a federal grand jury investigation of a government official's

private conduct and is the only Court of Appeals case that has actually decided whether a governmental attorney-client privilege should exist in the federal grand jury setting. *In re Grand Jury Subpoena*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482. That case involved a federal grand jury investigation of the private conduct of President and Hillary Clinton in what is known as the Whitewater matter. *See id.* at 913. The White House received a grand jury subpoena seeking “[a]ll documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton (regardless of whether any other person was present) pertaining to several Whitewater related subjects.” *Id.* The White House refused to produce two sets of notes responsive to the subpoena, asserting a governmental attorney-client privilege. *Id.* at 914. Both sets of notes were taken during meetings attended by White House attorneys, Mrs. Clinton, and her personal attorneys. *Id.*

The Eighth Circuit required production of both sets of notes, concluding that even if a governmental attorney-client privilege exists in other contexts, “the White House may not use the privilege to withhold potentially relevant information from a federal grand jury.” *Id.* at 915. Pursuant to Federal Rule of Evidence 501, the court applied the federal common law of attorney-client privilege to the facts and found that no governmental attorney-client privilege exists in the context of a federal criminal investigation. *Id.* The Eighth Circuit was not persuaded that Proposed Federal Rule of Evidence 503, which defines “client” to include public officers or public organizations, or the few cases involving a governmental attorney-client privilege in fact established such a privilege in the grand jury context. *Id.* at 916-17. As a result, the Eighth Circuit “turned to general principles” about privileges and the grand jury and decided not to recognize such a privilege. *Id.* at 918, 919-21.

The majority rejected the dissent’s decision to recognize a qualified governmental attorney-client privilege that would be subject to the *Nixon* balancing test regarding executive

privilege, concluding that no governmental attorney-client privilege, not even a qualified one, should exist in the federal grand jury context. *In re Grand Jury Subpoena*, 112 F.3d at 919. Under the *Nixon* test, the grand jury's need for the subpoenaed material is balanced against the White House's need for confidentiality. 418 U.S. at 712-13. Executive communications, which the Court discussed earlier, are presumed privileged unless the proponent of the subpoena can overcome the presumption with a sufficient showing of specific need for the privileged material. *Id.* at 713. The dissenting judge in the Eighth Circuit case thought this analysis should supply to the governmental attorney-client privilege to ensure that the President receives candid, confidential legal advice that will be disclosed only if a federal grand jury truly needs it. *In re Grand Jury Subpoena*, 112 F.3d at 926-27. The majority did not find *Nixon* to be "directly controlling" as it addressed a different privilege, but did find the case indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." *Id.* at 919.

2. *Applicability of the Governmental Attorney-Client Privilege*

In seeking to compel Lindsey to testify, the OIC asks the Court to follow the majority opinion in the Eighth Circuit case and find that no attorney-client privilege exists in the federal grand jury context. The White House urges this Court not to follow the Eighth Circuit case, insisting that the majority's reasoning is flawed and that the D.C. Circuit clearly recognizes an absolute governmental attorney-client privilege. The White House argues that the attorney-client privilege is an absolute privilege and that it should therefore apply equally to civil and criminal matters regardless of whether a

private or government party asserts the privilege.⁷ The amicus brief of the Attorney General asks the Court to recognize a qualified privilege that would “balance the demands of criminal law enforcement against the asserted need for confidentiality [by the White House].” Brief Amicus Curiae for the United States Acting Through the Attorney General at 7-8 (“Attorney General Amicus Brief”). While the Attorney General does not request a specific balancing test, she does suggest a standard of need similar to the one established in *Nixon*. See Brief Amicus Curiae for the United States, Acting Through the Attorney General, Supporting Certiorari, in *In re Grand Jury Subpoenas*, 112 F.3d 910 (8th Cir.1997), at 15.⁸

In this Circuit, an absolute governmental attorney-client privilege does apply to FOIA cases and other civil cases in which government attorneys represent government agencies or employees against private litigants in matters involving official government conduct. D.C. Circuit FOIA cases,⁹ Proposed Rule of Evidence 503, and the D.C. Bar’s Rules of Professional Conduct¹⁰ all recognize such a privilege.¹¹ In light

⁷ The White House also seeks a qualified governmental attorney-client privilege in the alternative, if the Court rejects its arguments for an absolute privilege.

⁸ The Amicus Brief filed in this matter incorporates the arguments made by the Attorney General in support of the petition for certiorari in *In re Grand Jury Subpoena*, 112 F.3d 910 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997).

⁹ See, e.g., *Tax Analysts*, 117 F.3d at 618; *Brinton v. Dep’t of State*, 636 F.2d 600, 603 (D.C. Cir. 1980); *Mead Data Central v. Dep’t of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).

¹⁰ See District of Columbia Rules of Professional Conduct, R. 1.13 & cmt. 7, 1.6 & cmts. 33-36.

¹¹ “Uniform Rule [of Evidence] 502 limits the governmental privilege to situations involving a pending investigation or litigation and requires a finding by the court that disclosure will ‘seriously impair’ the agency’s pursuit of the investigation or litigation.” *In re Grand Jury Subpoena*, 112 F.3d at 916 (citing Unif. R. Evid. 502(d)(6)).

of these authorities and the President's need for confidential legal advice, *see Nixon*, 418 U.S. at 708, the Court concludes that a governmental attorney-client privilege does apply in the federal grand jury context. In *Nixon*, the Supreme Court found that President Nixon's need for confidential advice from his advisers supported the existence of an executive privilege, acknowledging that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* This Court finds the President's need for confidential legal advice from the White House Counsel's Office to be as legitimate as his need for confidential political advice from his top advisers. This compelling need supports recognition of a governmental attorney-client privilege even in the context of a federal grand jury subpoena.

3. *The Scope of the Governmental Attorney-Client Privilege*

Although the Court finds that a governmental attorney-client privilege should apply in the federal grand jury context, the Court is not willing to recognize an absolute privilege. Even though this privilege is absolute in civil cases, such as FOIA cases, this Court finds FOIA cases to be distinguishable from federal grand jury matters because the former involve civil litigation between the federal government and private parties seeking information from the government, whereas the latter involve criminal matters in which a government party seeks information from another government agency. *In re Grand Jury Subpoenas*, 112 F.3d at 918-19. The Court agrees with the Eighth Circuit that the criminal/civil distinction is significant and that "[m]ore particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another." *Id.* at 916 (quoting *Restatement (Third) of the Law Governing Lawyers* § 124 cmt. b). In the context of a federal grand jury investigation where one government agency needs information from another to determine if a crime has been

committed, the Court finds that the governmental attorney-client privilege must be qualified in order to balance the needs of the criminal justice system against the government agency's need for confidential legal advice.

The Supreme Court's reasons for recognizing a qualified and not absolute executive privilege in *Nixon* support this Court's conclusion that a qualified governmental attorney-client privilege should apply in the federal grand jury context. In *Nixon*, President Nixon claimed an absolute executive privilege in response to a trial subpoena for tapes and documents regarding his conversations with his staff and aides. 418 U.S. at 688-89. The Supreme Court held that only a qualified executive privilege should exist in the criminal trial context. *Id.* at 711-12 n.19. This Court agrees with the Supreme Court that "[t]he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." *Id.* at 707. Although the D.C. Circuit recognizes an absolute government attorney-client privilege in FOIA cases and in other civil cases in which a government attorney represents a government agency or employee, the Court finds that this absolute privilege should not be "expansively construed" to apply to a federal grand jury investigation for such a privilege would clearly be "in derogation of the search for truth." *Id.* at 710. The Court believes that a qualified governmental attorney-client privilege will permit federal grand juries to search for the truth about alleged crimes while simultaneously protecting the need of the White House for confidential legal communications.

The White House claims that candid legal advice will be chilled if the Court does not recognize an absolute governmental attorney-client privilege in the federal grand jury context. Similar arguments were rejected by the Supreme Court with respect to the assertions of executive privilege by President Nixon and with respect to a privilege

asserted by state legislators comparable to that of members of Congress.¹² Like the Supreme Court, this Court “cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.” *Nixon*, 418 U.S. at 712. The argument is also unpersuasive for reasons articulated by the Eighth Circuit:

Because agencies and entities of the government are not themselves subject to criminal liability, a government attorney is free to discuss anything with a government official—except for potential criminal wrongdoing by that official—without fearing later revelation of the conversation. An official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.

In re Grand Jury Subpoena, 112 F.3d at 921. Only a qualified governmental attorney-client privilege in the grand jury

¹² In *United States v. Gillock*, the Supreme Court rejected similar arguments:

We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive privilege were found wanting in *United States v. Nixon*, when balanced against the need of enforcing federal criminal statutes. There, the genuine risk of inhibiting candor in the internal exchanges at the highest levels of the Executive Branch was held insufficient to justify denying judicial power to secure all relevant evidence in a criminal proceeding. Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.

445 U.S. 360, 373 (1980) (citations omitted).

context can balance the President's need for frank legal advice against the grand jury's need for relevant evidence of criminal conduct.

Since the *Nixon* decision in 1974, the White House has operated effectively under a qualified executive privilege. The President continues to receive candid political advice from his top aides and the Court has no doubt that the President will continue to receive sound legal advice from White House attorneys under a qualified governmental attorney-client privilege. The Court shares the belief of the D.C. Circuit that:

So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations—we believed in *Nixon v. Sirica*, and continue to believe, that the effective functioning of the presidential office will not be impaired.

Senate Select, 498 F.2d at 730. The Court is confident that “the President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.” *Nixon*, 418 U.S. at 713.

The Court's decision to make the attorney-client privilege qualified like the executive privilege not only respects the needs of the criminal justice system, but also saves courts from having to apply two different privilege standards to conversations commingling political and legal advice to the President. Many of the President's top advisers, such as Lindsey, provide both legal and political advice to the President and White House discussions often involves a mixture of the two. If no privilege applied to legal advice in the White House, as the OIC would have it, White House attorneys might be tempted to characterize their advice as

political to acquire the qualified protection of the executive privilege. Similarly, if an absolute privilege applied to legal advice to the President while only a qualified executive privilege applied to political advice, the President and his staff might be tempted to characterize confidential political communications as legal in order to obtain greater protection. The Court finds that an absolute government attorney-client privilege would overly complicate communications to the President for both White House employees and the federal court, that it would unduly frustrate the world of federal grand juries, and that it is not necessary to ensure candid legal advice to the President.

The White House argues that the attorney-client privilege has always been an absolute privilege and that it should not be qualified in the federal grand jury context. Although it is true that a private party may invoke an absolute attorney-client privilege in both civil and criminal matters, including federal grand jury investigations,¹³ the Court finds that the differences between private and governmental organizations noted by the Eighth Circuit provide compelling reasons for qualifying the governmental attorney-client privilege in the context of a federal grand jury investigation. See *In re Grand Jury Subpoena*, 112 F.3d 920. While the Eighth Circuit majority found these differences provided sufficient grounds for not recognizing any governmental attorney-client privilege in the federal grand jury context, this Court finds the differences support qualifying the privilege so that it may be overcome when a federal grand jury can show sufficient need for otherwise privileged material.

A private organization such as a corporation and a government institution such as the White House differ significantly, especially in the criminal context. First, as the

¹³ See *Hickman v. Taylor*, 329 U.S. 495 (1947); *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997), cert. granted sub. nom *Swidler & Berlin v. United States*, 66 U.S.L.W. (U.S. Mar. 30, 1998) (No. 97-1192); *In re Sealed Case*, 107 F.3d 46 (D.C. Cir. 1997).

Eighth Circuit pointed out, the conduct of White House personnel cannot subject the White House as a legal entity to criminal liability. *Id.* The alleged conduct of Ms. Lewinsky and President Clinton may subject them to criminal prosecution or impeachment respectively, but their conduct cannot implicate the White House in any criminal or civil litigation. As the Eighth Circuit pointed out, there is a difference between “official misconduct” and “misconduct by officials” and it is clear that “[t]he OIC’s investigation can have no legal, factual, or even strategic effect on the White House as an institution.” *Id.* at 923. The conduct of corporate employees, however, can expose a corporation to civil and criminal liability. *Id.* For this reason, corporate attorneys need an absolute privilege so that they can obtain candid information from corporate employees and provide competent legal advice to the corporation, as the Supreme Court fully recognized in *Upjohn*. 449 U.S. 383, 389-90 (1981). Given that no liability threatens the White House, its attorneys do not have as compelling a need to obtain full and candid information from the President regarding an investigation of his alleged private misconduct and thus do not need the protection of an absolute attorney-client privilege as much as private corporations do.

In fact, White House attorneys, like all other executive branch employees, have a statutory duty to report any criminal misconduct by other employees to the Attorney General. *See* 28 U.S.C. § 535(b); *In re Grand Jury Subpoena*, 112 F.3d at 920. Unlike a private attorney representing a corporation, when a White House attorney learns that a White House employee has engaged in criminal conduct, he must report such conduct. A private attorney is under no such obligation unless the conduct poses a threat of death, substantial bodily harm, or bribery of witnesses, jurors, or court officials. *See* D.C. Rules of Professional Conduct, Rule 1.6(c); Model Rules of Professional Conduct, Rule 1.6(b). The Eighth Circuit refused to recognize a governmental attorney-client privilege in the context of a federal grand jury investigation in part because such a privilege would conflict

directly with the duty established by section 535(b). *In re Grand Jury Subpoena*, 112 F.3d at 920. The White House challenges the Eighth Circuit's reasoning, arguing that section 535(b) and memoranda interpreting it from the Justice Department's Office of Legal Counsel¹⁴ show no congressional intent to vitiate the attorney-client privilege. The Attorney General's amicus brief also asserts that section 535(b) must be interpreted consistently with the governmental attorney-client privilege. *See Attorney General Amicus Brief* at 11.

Nothing in the language of the statute or its legislative history suggests a congressional intent either to vitiate the privilege or to exempt government attorneys from the duty to report. *In re Grand Jury Subpoena*, 112 F.3d at 932 (noting "the absence of any discussion of the subject in the legislative history") (citation omitted). The Court acknowledges that the Justice Department has interpreted the section consistently with a governmental attorney-client privilege outside of the grand jury context. Accordingly, the Court finds that section 535(b) neither precludes nor requires the recognition of a governmental attorney-client privilege in the federal grand jury context. Rather, the Court finds that section 535(b)'s duty to report criminal activity provides further support for the Court's conclusion that the governmental attorney-client privilege should be qualified in the context of a federal grand jury investigation of an official's alleged misconduct. Under a qualified privilege, government attorneys would be required

¹⁴ *See* Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Memorandum for the Deputy Attorney General re: Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee at 2 (Nov. 30, 1976); Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, Duty of Government Lawyers Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship with Another Government Employee at 6 (March 29, 1985) (both cited in *In re Grand Jury Subpoena*, 112 F.3d at 932 (Kopf, J., dissenting)).

to report privileged information regarding possible criminal activity, as section 535(b) requires, when a federal grand jury could demonstrate sufficient need for such information.

The Court's decision to qualify the governmental attorney-client privilege in the context of a federal grand jury investigation is also supported by the fact that White House attorneys, unlike private attorneys, work for the American public. As the Eighth Circuit pointed out, "the general duty to public service calls upon government employees and agencies to favor disclosure over concealment." *Id.* at 920. The Supreme Court has found that the public responsibilities of accountants weighed against giving them work product immunity, see *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984), and in refusing to recognize a governmental attorney-client privilege for White House attorneys, the Eighth Circuit recognized that White House attorneys bear far greater public responsibilities than private accountants. *In re Grand Jury Subpoena*, 112 F.3d at 921. This Court finds that the public responsibilities of White House attorneys weigh in favor of requiring them to divulge otherwise privileged information when a federal grand jury needs such information to determine whether a crime has been committed. The Court believes that "the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a[n] [absolute] governmental attorney-client privilege in criminal proceedings inquiring into the actions of public officials." *Id.*

The Court shares the Eighth Circuit's belief that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets." *Id.* This is especially true given the large number of attorneys working for the federal government. See *id.* (recognizing the "pernicious potential of [a governmental attorney-client privilege] in a government top-heavy with lawyers") (citation omitted). White House attorneys are paid by U.S. taxpayers to provide legal advice

on official presidential decisions, not the private decisions of President Clinton, and certainly not private, potentially criminal conduct. Members of the White House Counsel's office are not, and should not be, representing President Clinton in the grand jury investigation regarding Monica Lewinsky; the President's private attorneys have been hired to do this. The Eighth Circuit made this clear to the White House when it refused to recognize a governmental attorney-client privilege under very similar circumstances. *Id.* at 915. Since the issuance of the Eighth Circuit opinion in February 1997, the White House has been on notice that legal communications between the President and White House attorneys regarding federal grand jury investigations of the President or the First Lady's alleged private misconduct are not guaranteed absolute protection. Thus, if President Clinton had legal communications with White House attorneys regarding the grand jury investigation of the Monica Lewinsky matter, just as Hillary Clinton did in the Whitewater grand jury investigation, he did so "at [his] peril" because both the majority and the dissent of the Eighth Circuit opinion made clear that such consultations would no longer be absolutely protected. *Id.* at 927 (Kopf, J., dissenting).¹⁵

¹⁵ Judge Kopf, in dissent, concluded that the *Nixon* balancing test for executive privilege should apply to the governmental attorney-client privilege and warned Mrs. Clinton that in the future her communications with White House attorneys could be subject to disclosure. He wrote:

because we should now declare for the first time that *Nixon* overcomes the White House privilege if a proper showing is made, Mrs. Clinton would consult with White House lawyers at her peril in the future. She would be informed from our opinion that such consultations might no longer be protected since the other party to her conversations (the White House and its lawyers) could be obligated to respond to a grand jury subpoena if the prosecutor made the showing required by *Nixon*. Consequently, in the future, and to the extent of a grand jury subpoena, any such communications could not legally be "intended" by Mrs. Clinton as "confidential" under Rule 503(a)(4) because she would know and understand that her communications could be "disclosed to third persons."

4. *The Standard of Need*

For all of the above reasons, the Court holds that the governmental attorney-client privilege is qualified in the context of a federal grand jury investigation and that, like the executive privilege, it can be overcome by a showing of need. This Court must determine what type of showing must be made to justify release to a federal grand jury of materials protected by the governmental attorney-client privilege. In the Espy case, the D.C. Circuit addressed the same question with respect to the White House's assertion of the executive privilege in response to a federal grand jury subpoena. *In re Sealed Case*, 121 F.3d at 742. As the Court discussed earlier, the D.C. Circuit held that, in order to overcome the presumption of executive privilege, the OIC must show two factors: "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." *Id.* at 754. The Court finds that the need analysis established by the D.C. Circuit in the Espy case for assertions of the executive privilege in response to a federal grand jury subpoena should also apply to assertions of the governmental attorney-client privilege in response to a federal grand jury subpoena. The need analysis in the Espy case is more relevant and appropriate than the need analysis established by the Supreme Court for trial subpoenas in *Nixon* and properly weighs the President's need for confidential legal advice against the grand jury's need for relevant and otherwise unavailable evidence. *Id.* at 755-57.

Although the Espy case involved the executive privilege, the Court finds that its two-prong need analysis should apply to the government attorney-client privilege for many of the same reasons articulated above in support of the Court's decision to make the governmental attorney-client privilege qualified like the executive privilege in the context of a

Id. at 927 (emphasis added).

federal grand jury investigation. The President's need for candid legal advice from the White House Counsel's Office and his need for frank political advice from his top advisers are comparable needs that require some degree of confidentiality. The grand jury's need for relevant evidence of crimes applies equally whether the executive privilege or the governmental attorney-client privilege has been asserted. Thus, the competing needs in both cases are similar and the need analysis established by the D.C. Circuit in the *Espy* case provides a thoughtful balance of these needs. By requiring the Special Prosecutor to show that "each discrete group of the subpoenaed materials [or testimony] likely contains important evidence," the first prong of the need analysis ensures "that the evidence sought must be directly relevant to issues that are expected to be central to the trial." *Id.* at 754. This prevents the prosecutor from engaging in a fishing expedition and assures the President and White House attorneys that their conversations will be protected unless they directly relate to a central matter of a criminal investigation. The second prong, which requires the prosecutor to show that the subpoenaed evidence "is not available with due diligence elsewhere," provides further protection for the President's need for confidential legal advice. *Id.*

As the Court noted earlier, applying the same need analysis to the White House's assertions of both the executive privilege and the governmental attorney-client privilege has the added benefit of sparing federal courts from having to apply two different legal standards to conversations combining political and legal advice to the President and removes the incentive to characterize one form of advice as the other in order to obtain greater privilege protection. This is especially important in the White House context because advisers such as Lindsey regularly provide both forms of advice within a single conversation. The Court also notes that "[t]he factors of importance and unavailability are also used by courts in determining whether a sufficient showing of need has been demonstrated to overcome other qualified executive privileges, such as the deliberative process privilege or the

law-enforcement investigatory privilege.” *Id.* at 755 (citing *In re Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1342 (D.C. Cir. 1984)). The Court finds no support for devising a different balancing test of the competing needs of the grand jury and the White House, especially given the similarities between the Espy case and the case at hand.

For all of the reasons articulated above, the Court holds that although an absolute governmental attorney-client privilege applies to civil cases in which government attorneys represent government agencies or government employees, only a qualified governmental attorney-client privilege applies to a subpoena issued by a federal grand jury. The Court further holds that this privilege can be overcome if the subpoena proponent can show “first, that each discrete group of the subpoena materials [or testimony] likely contains important evidence; and second that this evidence is not available with due diligence elsewhere.” *Id.* at 754. If the Court finds a sufficient showing of need, the Court shall order compliance with the subpoena subject to the relevancy standard established by *R. Enterprises*, 498 U.S. at 300. See *In re Sealed Case*, 121 F.3d at 759.

5. *Application of the Court’s Holding to the Subpoenaed Testimony*

The Court directed the OIC to inform the Court as to its need for the testimony withheld by Lindsey on the basis of the governmental attorney-client privilege. The OIC provided the Court with a substantial *ex parte* submission that the Court has reviewed *in camera*. This submission incorporates by reference the substance of the OIC’s *ex parte* submission demonstrating its need for conversations covered by the executive privilege because Lindsey often asserted both the governmental attorney-client privilege and the executive privilege with respect to the same subpoenaed communications. The “need” submission regarding the governmental attorney-client privilege identifies fourteen

categories of information sought from Lindsey and explains how each category meets the *In re Sealed Case* two-prong need standard.

The Court's finding of need cannot be detailed because the submission was reviewed *in camera* and involves matters subject to Federal Rule of Criminal Procedure 6(e)(2). *See id.* at 740. [REDACTED] The Court cannot describe the categories in any more detail without revealing "matters occurring before the grand jury." *See* Federal Rule of Criminal Procedure 6(e)(2).

The Court finds that all fourteen categories are "likely" to contain evidence that is "important" and relevant to the grand jury's investigation. *In re Sealed Case*, 121 F.3d at 754. As the Court explained before, if there were instructions from the President to obstruct justice or suborn perjury, they were likely communicated to his closest advisors, such as Lindsey, in conversations unlikely to have been recorded on paper. If the White House interviewed grand jury witnesses in order to determine how and whether the President or his aides could avoid compliance with grand jury subpoenas or otherwise obstruct the investigation, then the witnesses' identities and the substance of those interviews would shed light on this. Similarly, if the President disclosed to his closest legal advisor that he committed crimes of perjury or obstruction of justice, he likely made the disclosure in a conversation, not in writing. Because "the content" of the conversations covered by the governmental attorney-client privilege likely contains important and relevant evidence to the crimes under investigation, the grand jury's need for those conversations is as "undeniable" as it is for communications protected by the executive privilege. *Id.* at 761 (citation omitted).

The OIC has shown with sufficient specificity that the subpoenaed testimony from Lindsey is not available with due diligence elsewhere. *See id.* at 754. The D.C. Circuit has stated that "when . . . an immediate White House advisor is being investigated for criminal behavior[,] . . . the subpoena proponent will be able easily to explain why there is no

equivalent to evidence likely contained in the subpoenaed materials.” *Id.* at 755. [REDACTED] The *ex parte* submission amply demonstrates the OIC’s diligent but unsuccessful efforts to obtain this evidence from sources other than Lindsey whenever it was possible.

The Court finds that the OIC’s showing of need has overcome Lindsey’s assertions of the governmental attorney-client privilege. Accordingly, the Court orders Lindsey to comply with the subpoena by answering the questions posed to him by the OIC and the grand jurors. If Lindsey finds the questions do not meet the relevancy standard established by *R. Enterprises*, the Court will be available to make this determination.

6. *The Common Interest Doctrine*

Lindsey also asserts that conversations with the President’s private attorneys that he held in his official capacity as Deputy White House Counsel are protected under the common interest doctrine. [REDACTED], the Court finds that the White House and the President as an individual do not share sufficiently common interest in the grand jury investigation and the Paula Jones case for the common interest doctrine to apply.

7. *The Governmental Work Product Doctrine*

Lindsey has asserted that the work product doctrine protects subpoenaed testimony regarding his interviews with grand jury witnesses and their attorneys. [REDACTED] Lindsey has indicated that there are no work product documents. [REDACTED] The work product doctrine provides qualified protection for an attorney’s work product prepared in anticipation of litigation. *See* Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947). The doctrine applies in criminal cases, *see United States v. Nobles*, 422 U.S. 225, 239 (1975), and courts have “uniformly held that the work product doctrine applies to grand jury proceedings.” *United States v. Davis*, 636 F.2d 1028, 1039 n.10 (5th Cir. 1981). It is clear that a government party may

invoke the doctrine in civil cases. See *NLRB v. Sears & Roebuck & Co.*, 421 U.S. 132, 154 (1975). Even if a governmental work product doctrine applies in the criminal context, the Court finds that it does not apply to Lindsey's interviews because they were not in anticipation of an adversarial proceeding. Whenever the government invokes the doctrine, it bears the burden of establishing its essential elements. See *In re Grand Jury Subpoena*, 112 F.3d at 925. One of the essential elements is that "the attorney was preparing for or anticipating some sort of adversarial proceeding involving his or her client." *Id.* at 924.

In the Eighth Circuit case involving Mrs. Clinton and the Whitewater investigation, the Court held that the work product doctrine did not apply to notes taken by a White House lawyer during a meeting involving Mrs. Clinton, her personal attorneys, and White House attorneys because the White House lawyer did not take the notes in "anticipation of litigation." *Id.* The Court rejected the White House's argument that the White House lawyer was preparing for the OIC's investigation because the OIC was investigating Mrs. Clinton as a private individual, not the White House. *Id.* Similarly, the Court rejected the White House's claim that its attorneys were anticipating litigation because they expected congressional hearings of employees at the White House and the institution itself. *Id.* The Court did not decide whether a congressional investigation constituted "an adversarial proceeding," but noted that even if it did, "the only harm that could come to the White House as a result of such an investigation is political harm" and that this did not meet the requirements of the work product doctrine. *Id.* at 924-25.

Like the Eighth Circuit, this Court holds that the work product doctrine does not apply to interviews with grand jury witnesses or their counsel conducted by White House attorneys, such as Lindsey, because they were not conducted in anticipation of litigation. Lindsey asserts that he conducted these interviews "for the purpose of providing legal and other advice to the witnesses," [REDACTED], and refers vaguely

to “the ongoing grand jury investigation and potential Congressional proceedings,” [REDACTED], but fails to explain why these proceedings constitute “litigation” for the White House. The Court finds that Lindsey and other White House attorneys could not have been conducting the interviews in anticipation of an adversarial proceeding because the OIC is not investigating the White House. *In re Grand Jury Subpoena*, 112 F.3d at 924. The White House is not involved in any adversarial proceeding. Neither the OIC nor the Congress will be investigating the White House as an institution with respect to the Lewinsky matter. Because the White House has failed to meet its burden of showing that Lindsey’s interview were in anticipation of litigation, the work product doctrine does not apply to those interviews.

II. Conclusion

For the foregoing reasons, the Court will grant the motions of the Office of Independent Counsel to compel the testimony of Bruce Lindsey and Sidney Blumenthal and will deny as moot the motion to compel the testimony of [REDACTED]. An appropriate Order will issue on this date.

/s/
NORMA JOLLOWAY JOHNSON
CHIEF JUDGE

Date: May 26, 1998

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**MISC. ACTION NOS. 98-095,
98-096 & 98-097 (NHJ)**

IN RE GRAND JURY PROCEEDINGS

**FILED
MAY 27, 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT**

**REDACTED VERSION
ORDER**

Upon consideration of the motions of the Independent Counsel to compel, supporting and opposing memoranda, and oral argument on the motions, and for the reasons given in the accompanying Memorandum Opinion, it is this 26th day of May 1998,

ORDERED that the motion of the Independent Counsel to compel Bruce Lindsey to testify in Miscellaneous Action No. 98-95 be, and hereby is, granted; it is further

ORDERED that the motion of the Independent Counsel to compel Sidney Blumenthal to testify in Miscellaneous Action No. 98-96 be, and hereby is, granted; and it is further

ORDERED that the motion of the Independent Counsel to compel [REDACTED] to testify in Miscellaneous Action No. 98-97 be, and hereby is, denied as moot.

/s/

**NORMA HOLLOWAY JOHNSON
CHIEF JUDGE**

35A

No. 98-3060

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

SEPTEMBER TERM, 1997

In re: Sealed Case
98-3061
98-3062

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT FILED
MAY 21, 1998
CLERK

BEFORE: Ginsburg, Randolph, and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's emergency motion to expedite consideration of appeal and for expedited briefing schedule filed in Nos. 98-3060 and 98-3061, and the response thereto; the motion of the United States of America for summary dismissal for want of jurisdiction, the responses thereto, and the reply; and the consent motion by the United States of America, acting through the Attorney General for access to sealed appellate docket, it is

ORDERED, on the court's own motion, that these cases be consolidated. It is

FURTHER ORDERED that consideration of the motions to expedite, to dismiss, and for access to sealed appellate docket be deferred pending further order of the court. It is

FURTHER ORDERED, on the court's own motion, that these be held in abeyance pending the district court's disposition of the motions for reconsideration pending before

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it in the underlying cases. The parties are directed to inform this court immediately once the district court has ruled on those motions. Any further appeals, whether from the underlying decision or the order on reconsideration, will be consolidated with these cases.

The Clerk is directed to send a copy of this order to the district court.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

By: /s/
Linda Jones
Deputy Clerk/LD

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No. 98-3060

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

SEPTEMBER TERM, 1997

In re: Sealed Case
98-3061
98-3062

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT FILED
MAY 27, 1998
CLERK

Consolidated with 98-3061, 98-3062.

BEFORE: Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's emergency motion to expedite consideration of appeal and for expedited briefing schedule filed in Nos. 98-3060 and 98-3061, and the response thereto; the motion of the United States of America for summary dismissal for want of jurisdiction, the responses thereto, and the reply; and the consent motion by the United States of America, acting through the Attorney General, for access to sealed appellate docket, it is

ORDERED, on the court's own motion, that the court's order filed May 21, 1998, be vacated to the extent it ordered these cases held in abeyance. The Clerk is directed to return the cases to the active docket. It is

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FURTHER ORDERED that the motion to dismiss be dismissed as moot in light of the district court's May 26, 1998 order disposing of the motion for reconsideration. It is

FURTHER ORDERED that consideration of the motions to expedite and for access to sealed appellate docket be deferred pending further order of the court. In light of the reactivation of these appeals, Independent Counsel is directed to file any further response to the motion to expedite by close of business on Friday, May 29, 1998.

Per Curiam

/s/ _____
/s/ _____
/s/ _____

39A

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

**Division for the Purpose of
Appointing Independent Counsels**

United States Court of Appeals
For the District of Columbia Circuit
FILED: JAN 16, 1998
Special Division

In re: Madison Guaranty Savings & Loan
Association Division No. 94-1

Before: Sentelle, Presiding, Butzner and Fay, Senior
Circuit Judges

ORDER

Upon consideration of an oral application for the expansion of jurisdiction of an Independent Counsel provided to this Court on behalf of the Attorney General on January 16, 1998, it is hereby

ORDERED that the investigative and prosecutorial jurisdiction over the following matters be referred to Independent Counsel Kenneth W. Starr and to the Office of the Independent Counsel as an expansion of prosecutorial jurisdiction in lieu of the appointment of another Independent Counsel pursuant to 593(c)(1):

(1) The Independent Counsel shall continue to enjoy the full jurisdiction initially conferred upon him as a result of the August 5, 1994, order of the Special Division of the Court and all subsequent orders concerning jurisdiction. Pursuant to 28 U.S.C. § 593(c)(1), the Independent Counsel's jurisdiction shall be expanded to include the following:

(2) The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*.

(3) The Independent Counsel shall have jurisdiction and authority to investigate related violations of federal criminal law, other than a Class B or C misdemeanor or infraction, including any person or entity who has engaged in unlawful conspiracy or who has aided or abetted any federal offense, as necessary to resolve the matter described above.

(4) The Independent Counsel shall have jurisdiction and authority to investigate crimes, such as any violation of 28 U.S.C. § 1826, any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, arising out of his investigation of the matter described above.

(5) The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

It is further ORDERED that this document and its contents be and remain UNDER SEAL absent further Order of this Court.

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This the 16th day of January, 1998.

Per Curiam For the Court:

/s/

Marilyn Sargent
Chief Deputy Clerk

TEXT OF RELEVANT STATUTE AND RULES

28 U.S.C. § 535(b) provides that:

Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless

- (1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or
- (2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

Fed. R. Evid. 501 provides that:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.

Fed. R. Civ. P. 26(b)(3) provides that:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety,

indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

REDACTED

No. 97-1924

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER
v.

WILLIAM JEFFERSON CLINTON
and THE OFFICE OF THE PRESIDENT OF THE UNITED
STATES, RESPONDENTS

ON PETITION FOR A WRIT OF
CERTIORARI BEFORE JUDGMENT TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITIONER

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REDACTED

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IN THE
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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT
OF CERTIORARI BEFORE JUDGMENT TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

After months of litigation, the President has recognized that, in light of *United States v. Nixon*, 418 U.S. 683 (1974), his claim of executive privilege for presidential communications cannot prevail. He thus has withdrawn the argument that he can withhold relevant information from the federal grand jury on that basis.¹ The question, then, is whether this case

¹ The President's strategic use and later withdrawal of executive privilege is by no means novel. In 1996 the President asserted executive privilege in response to grand jury subpoenas issued in the Eastern District of Arkansas. After this Office fully briefed the issue in the district court, the President abandoned the claim. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 913-14 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997). In this case, the President has done precisely the same thing after requiring substantial effort by the district court and filing a notice of appeal on that issue in the Court of Appeals. The President now says that he would not even have raised an executive privilege argument in the Court of Appeals. Br. for Resp't White House in Opp'n, 1-2. That is inaccurate. The President filed a notice of appeal with respect to the testimony of Sidney Blumenthal, and the only privilege asserted as to Mr. Blumenthal was executive privilege.

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continues to warrant this Court's review before judgment in the Court of Appeals. The answer is yes.

1. The critical fact justifying this Court's review — and review before judgment in the Court of Appeals — still remains: By asserting a purported privilege for governmental attorney-client communications, the President of the United States has directly challenged the ability of the federal grand jury to obtain evidence of possible criminal acts by the President and others. This is, save for *Nixon*, without parallel in the history of the Republic.

Because the President himself (among others) is under criminal investigation, the grand jury, this Office, the President, the Congress, and the Nation have a compelling interest that the matter be resolved quickly and definitively. More months of protracted litigation are inimical to the Nation's well-being. The facts are needed, and they are needed now.

This is not our view alone. To the contrary, the President himself stated in January of this year that the American people are entitled to more rather than less, sooner rather than later. That is still true. We will be blunt: The Nation has a compelling interest that this criminal investigation of the President of the United States conclude as quickly as possible — that indictments be brought, possible reports for impeachment proceedings issued, and non-prosecution decisions announced. This Court's immediate review would powerfully serve that vital goal.

The President's response treats this as a matter-of-fact investigation. But the unhappy fact is that, at the determination of the Attorney General herself, a President is under serious criminal investigation. That unfortunate circumstance is a rare occurrence in our Nation's history. A President who invokes *governmental* privileges that have the effect of thwarting such an investigation is even rarer. (Only two of forty-two Presidents have seen fit to do so.) And

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issues involving the President that arise during the course of such an investigation are necessarily vital to the functioning of the Executive Branch and to the people as a whole. In particular, few issues more directly implicate the rule of law than a President using, or appearing to use, newly asserted *governmental* privileges that serve, at least in part, to protect the *personal* interests of the President himself (and his close associates). *Cf. Clinton v. Jones*, 117 S. Ct. 1636 (1997).

2. We fully appreciate the weighty, prudential concerns that this Court's scarce resources not be expended on ordinary or unimportant legal issues, no matter how important the factual settings in which they arise. The precise question for this Court's evaluation, therefore, is whether the issue of a governmental attorney-client or work product privilege in federal criminal proceedings is the kind of legal issue that warrants this Court's review.

On that question, the President himself has spoken. Last year, he petitioned this Court for review of a decision from the United States Court of Appeals for the Eighth Circuit, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997), rejecting these exact privileges in criminal proceedings. The President himself told this Court:

- "These rulings are important enough to require *prompt* review by this Court." Reply Br. for Pet'r 1, *Office of the President v. Office of Independent Counsel*, No. 96-1783 (emphasis added).
- "The Eighth Circuit has issued an extraordinary and unprecedented decision that will substantially impair the ability of the Office of the President (and other federal agencies) to secure sound legal advice" Pet. for Writ of Cert. 9, *Office of the President v. Office of Independent Counsel*, No. 96-1783.

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- The Eighth Circuit's ruling (with which the district court here has largely agreed) is "indefensible" and would cause "grave consequences for the government." *Id.* at 11, 10.
- "[T]he Eighth Circuit's ruling shapes the decisionmaking of every official and every lawyer in the White House during every working day." Reply Br. for Pet'r 1, *Office of the President v. Office of Independent Counsel*, No. 96-1783.
- "These are now very real questions in the daily business of the White House. So long as they go unanswered, the resulting uncertainty will inevitably constrain the layman's willingness to seek legal advice" *Id.* at 2.
- "[T]he need for review is far greater here, [than in *Clinton v. Jones*] because substantial reliance interests are at stake. . . . [P]rompt and definitive explanation of the nature of the new rules is essential." *Id.* at 4.
- "[T]he majority's restrictions on the scope of the work product protection . . . would have dramatic practical consequences" *Id.* at 5.

Nor was the President alone in his views. The President's petition for certiorari was supported by the Department of Justice in a carefully framed amicus submission. It was supported by several amicus briefs from law professors, joined by several former White House Counsel.² The President's current view to the contrary oddly contradicts not

² The President states that the issue here differs because the communications involve the President and his White House advisors. See Br. for Resp't White House in Opp'n 10. But the precise legal question presented a year ago was just that question. *The President has never argued that the attorney-client privilege is more protective when it involves presidential communications; indeed, the President argued to the contrary a year ago.*

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only his petition last year, but a motion filed by the President only a few weeks ago. At that time, in seeking to expedite the matter in the Court of Appeals, the President stated that the district court's order "has *continuing* adverse effects on the ability of White House Counsel and other senior advisors to advise the President and the White House." Appellant's Emergency Mot. to Expedite Consideration of Appeal, and for Expedited Briefing Schedule 2, *In re: Sealed Case*, Nos. 98-3060 & 98-3061 (emphasis added).

3. To be sure, we opposed the President's petition in *Office of the President v. Office of Independent Counsel*. We believed then — and believe now — that the legal issue, while important, is straightforward. In our view, the issue is controlled by, *inter alia*, this Court's decision in *Nixon* and by 28 U.S.C. § 535(b). *See* Pet. for Writ of Cert. 13-14. But our decision to oppose certiorari was based on our belief that this Court's review would delay the investigation — a factor that now counsels in favor of prompt review. We also believed that the Eighth Circuit's well-reasoned decision, coupled with a denial of certiorari by this Court, would persuade the President to recede from his invocation of governmental attorney-client privilege in this investigation.

Our belief was mistaken. The President has chosen to assert the privilege again. Indeed, the President's vision of governmental attorney-client privilege has, if anything, expanded since this Court's denial of certiorari. Only a definitive decision from this Court will bring an end to such contrived privilege assertions.

4. The issues are fully developed for review by this Court, as the President and the Department of Justice suggested a year ago in urging this Court to grant certiorari. The Eighth Circuit last year issued a lengthy opinion analyzing the issues, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 913-26; Judge Kopf issued a separate opinion that, while also rejecting the White House's view,

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thoroughly analyzed the competing considerations, *id.* at 926-40 (Kopf, J., dissenting). In this case, Judge Johnson carefully considered these questions in her opinion in the district court. In sum, this Court, if it chooses to address the issue now, will have the benefit of three careful and lengthy opinions from lower courts and the full submissions of the President, the Department of Justice, and this Office.

5. This Court's review of this case would correspond to review of another case as to which we today have filed a petition for certiorari before judgment. In that case, the United States Secret Service has asked the federal courts to create a privilege to prevent Secret Service agents and officers from testifying before the grand jury. That novel claim was rejected by the district court, in part on the basis of 28 U.S.C. § 535(b). Section 535(b) imposes an affirmative duty on Executive Branch personnel to report "any information" regarding criminal activity by government officers and employees to the appropriate supervisor, normally the Attorney General. To the extent that Section 535(b) disposes of purported *common-law* governmental privileges asserted against a federal grand jury, this case and the Secret Service case go hand-in-hand.

6. [REDACTED].

7. The President argues that, unlike in *Nixon*, there are no impeachment proceedings under way. Br. for Resp't White House in Opp'n 10. The leadership of the House of Representatives has indicated that it awaits a report from this Office before it will consider whether to hold impeachment proceedings. For its part, the White House has stated that the specter of such proceedings substantially impacts the orderly administration of the Executive Branch. See Decl. of Charles F.C. Ruff ¶ 18, *In re Grand Jury Proceedings*, Misc. Action Nos. 98-095, 98-096, 98-097 (D.D.C. May 4, 1998). In this regard, the Court may wish to consider the need submissions presented to the district court. The evidence contained therein

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demonstrates the importance of Mr. Lindsey's testimony to the investigation and to the weighty statutory responsibility imposed on this Office.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

KENNETH W. STARR
Independent Counsel

JOSEPH M. DITKOFF
BRETT M. KAVANAUGH
Associate Independent Counsel

June 2, 1998

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No. 97-1942

IN THE
Supreme Court of the United States
October Term, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. RUBIN, SECRETARY OF THE TREASURY,
and LEWIS C. MERLETTI, DIRECTOR OF THE UNITED
STATES SECRET SERVICE, RESPONDENTS

**PETITION FOR A WRIT OF CERTIORARI BEFORE
JUDGMENT TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal law enforcement officers may assert a common-law “protective function privilege” that permits them to avoid testifying before a federal grand jury about evidence of criminal activity.

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PARTIES TO THE PROCEEDING

The parties to the proceeding are:

(i) the United States of America, represented in this criminal investigation by the Office of Independent Counsel Kenneth W. Starr, *see* 28 U.S.C. § 594(a)(9);

(ii) Secretary of the Treasury Robert E. Rubin and Director of the United States Secret Service Lewis C. Merletti, who have urged the creation of a “protective function privilege.”

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No. 97-1942

IN THE
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October Term, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. RUBIN, SECRETARY OF THE TREASURY,
and LEWIS C. MERLETTI, DIRECTOR OF THE UNITED
STATES SECRET SERVICE, RESPONDENTS

**PETITION FOR A WRIT OF CERTIORARI BEFORE
JUDGMENT TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The United States of America, by Kenneth W. Starr, Independent Counsel, *see* 28 U.S.C. § 594(a)(9), petitions for a writ of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit. *See* Sup. Ct. R. 11; 28 U.S.C. §§ 1254(1), 2101(e).

OPINIONS BELOW

The district court's opinion and order entered May 22, 1998, granting the United States' motion to compel two Secret Service uniformed officers and a Secret Service attorney to testify with respect to the questions as to which they have asserted the proposed "protective function privilege" (Pet. App. 1A, 10A), is not yet officially reported. The district court's order of June 1, 1998, [REDACTED], is also not yet officially reported.

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JURISDICTION

The order of the district court regarding the proposed “protective function privilege” was entered on May 22, 1998, in *In re Grand Jury Proceedings* (D.D.C. Misc. No. 98-148 (NHJ)). On June 1, 1998, the district court disposed of the remaining issue before it and entered a final judgment. See *Catlin v. United States*, 324 U.S. 229, 233-34 (1945). That same day, the United States Secret Service noticed its appeal from the district court’s ruling, and the certified record from the district court was docketed in the United States Court of Appeals for the District of Columbia Circuit (No. 98-3069). The jurisdiction of this Court to review the instant case, which is now pending in the court of appeals, see *Gay v. Ruff*, 292 U.S. 25, 30 (1934), is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

STATUTE AND RULE INVOLVED

The relevant portions of 28 U.S.C. § 535(b) and Fed. R. Evid. 501 are reproduced in the appendix.

STATEMENT

1. The district court granted a motion filed by the United States, represented by the Office of the Independent Counsel (“OIC”), see 28 U.S.C. § 594(a)(9), seeking to compel the testimony of two officers of the Secret Service’s Uniformed Division and a Secret Service attorney before a federal grand jury sitting in the District of Columbia. The grand jury is investigating

to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses or otherwise violated federal law other than a Class B or Class C misdemeanor or infraction in dealing with witnesses, potential witnesses,

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attorneys, or others concerning the civil case *Jones v. Clinton*.

In re: Madison Guaranty Savings & Loan Association (D.C. Cir. Spec. Div. Jan. 16, 1998) (Pet. App. 30A-31A).

Monica Lewinsky is a former White House intern and employee of the White House's Office of Legislative Affairs. In December 1997, Ms. Lewinsky was placed on a list of witnesses to be called by Paula Jones in the *Jones v. Clinton* litigation and was served with a subpoena requiring her to testify at a deposition in that case. On January 7, 1998, Ms. Lewinsky executed an affidavit representing under penalty of perjury that she had not had a sexual relationship with President Clinton.

This Office subsequently received allegations (i) that Ms. Lewinsky had in fact had a sexual relationship with President Clinton; (ii) that a friend of the President had advised Ms. Lewinsky on how to respond to her subpoena in the *Jones* case, found an attorney to represent her, and helped her find a new job; and (iii) that Ms. Lewinsky had tried to persuade Linda Tripp, a witness in the *Jones* suit, to commit perjury in connection with that case. On January 15, 1998, the OIC presented evidence relating to these allegations to officials of the Department of Justice. On the next day, the Attorney General petitioned the Special Division, on an expedited basis, to expand the OIC's jurisdiction.

In response to the Attorney General's request, the Special Division conferred jurisdiction on the OIC to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses or otherwise violated federal law" On January 17, 1998, President Clinton was deposed in connection with the *Jones* case, and was asked a number of specific questions about his relationship with Monica Lewinsky.

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2. The Special Division's jurisdictional grant authorizes the Independent Counsel to investigate whether federal crimes may have been committed by Monica Lewinsky "or others" in connection with the *Jones* litigation. Pet. App. 30A. From the beginning of its inquiry into this matter, the OIC has received -- and continues to receive -- numerous and credible reports that Secret Service personnel have evidence relevant to its investigation. Specifically, the OIC is in possession of information that Secret Service personnel may have observed evidence of possible crimes while stationed in and around the White House complex.

3. On January 27, 1998, representatives of the OIC met with representatives of the Secret Service to discuss the issue of testimony by Secret Service employees. Throughout the ensuing negotiations, the Secret Service maintained that testimony by Secret Service personnel about their observations while in close proximity to the President would undermine a practice of confidentiality traditionally maintained within that organization, and that disclosure of those observations would potentially lead future Presidents to distance themselves from Secret Service personnel. For its part, the OIC represented that, to the extent consistent with its statutory obligation to investigate and prosecute criminal conduct falling within its jurisdiction, it would attempt to accommodate the Secret Service's concerns. The OIC also represented that it would refrain from asking questions that would reveal protective techniques or procedures of the Secret Service.

In subsequent correspondence between the Secret Service and the OIC, the Secret Service asserted that some testimony by its personnel would be covered by a "protective function privilege." This privilege, the Secret Service maintained, would shield from grand jury scrutiny (i) observations of conduct, (ii) overheard statements, and (iii) observations of individuals made by Secret Service employees while performing a protective function in proximity to the President. The asserted privilege also would extend to hearsay communications of privileged information.

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Such a privilege, the Secret Service contended, cannot be waived by individual Secret Service officers or agents, because it is owned and controlled by the United States. On the Secret Service's view, the privilege need not be invoked by the President, but can instead be interposed by the Secretary of the Treasury.

The Secret Service also insisted that its proposed "protective function privilege" be regarded as absolute, with two exceptions. First, the privilege could theoretically be overridden by "compelling circumstances, such as overriding national security concerns," which do not exist here. Second, the privilege would not extend to situations where an agent or officer observes conduct or hears statements that are, *at the time*, sufficient to provide reasonable grounds to conclude that a felony has been, is being, or will be committed. In contrast, observations or statements that a Secret Service employee *only later* realizes constitute direct evidence of a felony are within the claimed privilege, and therefore forever unavailable to a federal grand jury on the Secret Service's view.

4. In an effort to alleviate the Secret Service's concerns and to create a record for any necessary litigation, the OIC agreed to receive testimony from Secret Service personnel through depositions at its offices rather than before the grand jury. On March 13, 1998, the OIC deposed two officers of the Secret Service's Uniformed Division, one of whom asserted the proposed "protective function privilege" in response to ten distinct questions, and the other of whom asserted the privilege in response to nine. On March 23, 1998, the OIC also deposed a Secret Service attorney, who asserted the "protective function privilege" in response to four distinct questions. This third witness also asserted the governmental attorney-client privilege and work product protection in response to a number of questions.

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5. On April 10, 1998, the United States moved to compel these three witnesses to testify regarding the matters as to which they had previously invoked the proposed "protective function privilege" and, with regard to the third witness, governmental attorney-client privilege and work product protection. The United States subsequently withdrew the portions of its motion to compel that related to the third witness's assertions of governmental work product protection.

6. The district court conducted an open hearing on the United States' motion on May 14, 1998. In an opinion and order entered May 22, 1998, Chief Judge Norma Holloway Johnson granted the motion to compel with respect to the questions as to which the three witnesses had invoked the "protective function privilege."

Chief Judge Johnson began her analysis by describing the nature of the privilege that the Secret Service had asserted. Consistent with the OIC's representation in its negotiations with the Secret Service, the court observed that "[n]one of the questions at issue relate to the protective techniques or procedures of the Secret Service." Pet. App. 1A. [REDACTED].

Turning to the decisions of this Court that govern the creation of new privileges, the district court held that Fed. R. Evid. 501 and this Court's precedents require courts to consider "1) whether the asserted privilege is historically rooted in federal law; 2) whether any states have recognized the privilege; and 3) public policy interests." Pet. App. 2A (citations omitted). After describing the traditional reluctance of the federal courts to create new evidentiary privileges, Judge Johnson briefly summarized this Court's recent decisions regarding the subject, noting that new privileges are far more frequently rejected than recognized.

The trial court next considered the history of the proposed "protective function privilege" in federal law. Recognizing that no court has ever adopted the privilege, and finding no constitutional, statutory, or common-law basis for it, the district

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court proceeded to analyze the two federal statutes relevant to the issue: 18 U.S.C. § 3056(a) and 28 U.S.C. § 535(b). Section 3056(a), the court observed, requires the President and Vice President to accept the protection of the Secret Service, but does not create an evidentiary privilege for its employees. Section 535(b), in turn, imposes an affirmative duty on Executive Branch personnel to report “any information” regarding criminal activity by government officers and employees to the appropriate supervisory authority (normally, the Attorney General). The district court’s analysis of this latter statute in particular led it to conclude that “a protective function privilege would contradict the goal of section 535(b), which is to have executive branch employees report criminal activity by government officials.” Pet. App. 4A.

Chief Judge Johnson also considered the implications of this Court’s recognition of the patient-psychotherapist privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996), taking account of the fact that “unlike the protective function privilege, the patient-psychotherapist privilege had some federal history.” Pet. App. 5A. In contrast, the court noted that the Secret Service has never attempted to assert the “protective function privilege” on any of the various occasions in which its employees have testified in the past. Accordingly, “the Secret Service’s own history, the lack of any constitutional or statutory support for the claimed privilege, and the federal case law regarding newly asserted privileges under Rule 501 all weigh against recognizing the privilege.” Pet. App. 5A-6A.

Turning to the history of the proposed privilege in state law, Judge Johnson observed that “[n]o state has ever recognized a protective function privilege or its equivalent,” and that this “absence of any state support for the privilege not only militates against recognizing [it], but also distinguishes it significantly from the patient-psychotherapist privilege recognized in *Jaffee*.” Pet. App. 6A. The fact that no state has ever adopted a “protective function privilege” for

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its governor, the court reasoned, indicates that the “reason and experience” that Fed. R. Evid. 501 requires for the creation of a new privilege are lacking. *Id.* at 6A.

The district court also examined the public policy justifications for the “protective function privilege” advanced by the Secret Service, including its argument that if testimony were compelled from its employees, “current and future Presidents would inevitably distance themselves from Secret Service personnel, thereby endangering the life of the Chief Executive.” Pet. App. 6A. In conjunction with this, the court acknowledged the uncontested fact that “[t]he physical safety of the President of the United States is clearly of paramount national importance.” *Id.* at 7A.

After carefully weighing the Secret Service’s policy and fact-based arguments, however, the district court rejected them. “While the concerns of the Secret Service are legitimate, the Court is not convinced that compelling Secret Service personnel to testify before a grand jury regarding evidence of a crime would place Presidents in peril.” Pet. App. 7A. The basis for this conclusion was the district court’s refusal to credit “the suggestion that the possibility that agents could be compelled to testify before a grand jury will lead a President to ‘push away’ his protectors,” and its concomitant finding that “[w]hen people act within the law, they do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury.” *Id.* Moreover, the court reasoned, it is by no means clear that a President “would push Secret Service protection away if he were acting legally or even if he were engaged in personally embarrassing acts,” because such actions “are extremely unlikely to become the subject of a grand jury investigation.” *Id.* In short, “[t]he claim of the Secret Service that ‘any Presidential action -- no matter how intrinsically innocent -- could later be deemed relevant to a criminal investigation’ is simply not plausible.” *Id.* (citation omitted).

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Finally, the trial court noted that previous published accounts of candid and highly embarrassing observations of Presidents have not ostensibly caused them to push their protectors away. Presidents have a "very strong interest" in protecting their own physical safety, the court found, and the Secret Service's educational process with regard to incoming Chief Executives will continue to instruct them of "the vital importance of close proximity" and the corresponding danger of any ill-advised "pushing away." Pet. App. 8A.

7. Following its decision in *In re Grand Jury Proceedings*, Misc. Nos. 98-095, 98-096, and 98-097 (D.D.C. May 4, 1998), the district court in its May 22 order also [REDACTED].

8. On June 1, 1998, the district court entered an order [REDACTED]. On the same day, the Secret Service filed a notice of appeal in the district court. The United States now seeks certiorari before judgment.

REASONS FOR GRANTING THE WRIT

1. The claims of privilege in this case, while novel, are of paramount importance to the country. The Director of the Secret Service has submitted a sworn declaration in which he asserts that compelled testimony by Secret Service personnel will result in a "grave" and "unacceptable" risk to the President (and future Chief Executives), and the President has publicly stated that he concurs in the Director's assessment. Both the OIC and Chief Judge Johnson have disputed this contention, but all readily agree that the physical safety of the President is a matter of urgent national and public concern. The Director has specifically claimed that

compelling Secret Service employees to divulge either communications overheard or actions observed as a result of protective duties would impose a permanent and devastating impact upon

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the Secret Service's ability to provide protection to any of our protectees. Indeed, I firmly believe that allowing this testimony to go forward will compromise the entire protective fabric enveloping a President, whether at the White House Complex or on the road. . . .

I further believe that the inevitable result [of compelled testimony] would be that a current or future protectee would seek to reposition Secret Service protective employees in order to ensure privacy and confidentiality or attempt, under some circumstances, to refuse protection entirely, a particularly problematic issue with regard to a President.

Pet. App. 25A-26A.

In the face of the Director's statements, the district court squarely rejected the suggestion that "compelling Secret Service personnel to testify before a grand jury regarding evidence of a crime [will] place Presidents in peril." Pet. App. 7A. The OIC similarly doubts the existence of any causal link between grand jury testimony by sworn law enforcement officers and the "pushing away" that the Secret Service claims will inevitably result. *But the Director believes that the President's life is now in jeopardy, and will remain so until a "protective function privilege" is definitively recognized by either Congress or the courts.* In our view, only this Court has the moral authority and public credibility to issue a final ruling on what the Secret Service plainly believes is a sensitive, life-or-death issue.

2. We are keenly aware that this Court's scarce resources are not best applied to the resolution of straightforward legal issues, no matter how important the factual circumstances in which they arise. That being said, as with the other claims of privilege employed to prevent the grand jury from obtaining relevant evidence, it is strongly in the Nation's interest that this case be resolved expeditiously

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so that the grand jury's inquiry can be completed at the earliest practicable date. This is, after all, a grave set of circumstances -- a specific jurisdictional mandate requested by the Attorney General of the United States implicating the President of the United States. It remains true that, as the President himself observed earlier this year, the American people are entitled to more rather than less, sooner rather than later. We respectfully submit that the Nation has a compelling interest in resolving a criminal investigation of the President as quickly as possible, and that this Court's immediate review would serve that goal.

3. The OIC has reason to believe that the "privileged" observations that the Secret Service is currently withholding from the grand jury would constitute important evidence in the OIC's evaluation of what federal crimes have been committed and by whom. As acknowledged in our Reply Brief submitted today in No. 97-1924, the President of the United States is under investigation. But the Secret Service, through its claim of "protective function privilege," has interposed itself between the grand jury and some of the most important evidence that it seeks. Numerous Secret Service employees -- in addition to the three witnesses at issue here -- appear to have putatively privileged information that is relevant to the United States' investigation.

The fact that Secret Service personnel have evidence highly relevant to an ongoing criminal investigation of the President (and others) is itself sufficient to bring the dispute to the level of "imperative public importance" required by this Court's Rule 11. If the ruling below were to proceed through the court of appeals, important portions of this investigation would be substantially delayed. The need for expeditious resolution of the dispute over the proposed "protective function privilege" has been widely acknowledged, including by the Secret Service. In that regard, Secret Service Director Lewis C. Merletti has publicly indicated his intent to press for ultimate review by this Court. *See, e.g.,* John M. Broder &

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Stephen Labaton, *Shaped by a Painful Past, Secret Service Director Fights Required Testimony*, N.Y. Times, May 30, 1998, at A7.

4. This case presents a challenge by an agency of the Executive Branch to the ability of a federal grand jury to obtain relevant evidence of possible criminal activity by Executive Branch officials. In cases presenting issues of similar import, this Court has granted writs of certiorari before final judgment in the court of appeals “because of the public importance of the issues presented and the need for their prompt resolution.” *United States v. Nixon*, 418 U.S. 683, 687 (1974); *see, e.g., Mistretta v. United States*, 488 U.S. 361, 371 (1989); *National Org. for Women, Inc. v. Idaho*, 459 U.S. 809, 809 (1982); *Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952); *United States v. United Mine Workers*, 330 U.S. 258, 269 (1947); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936); *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330 (1935); *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240 (1935); *see also* Sup. Ct. R. 11. We respectfully submit that far-ranging attempts by Executive Branch officers to block a federal grand jury from obtaining evidence that may incriminate their superiors present an issue of the sort of “imperative public importance” that Sup. Ct. R. 11 contemplates.

5. This case also involves a dispute over the scope of the federal courts’ authority to create federal common law privileges. The Secret Service (recognizing the implications of *United States v. Nixon* for any new privilege that falls under the rubric of executive privilege) has chosen to argue that its proposed absolute “protective function privilege” should be created as a matter of federal common law. But Congress has preempted any such weaving of federal common law in this context through 28 U.S.C. § 535(b), which directs Executive Branch employees to “expeditiously report[]” “any information” they may have that relates to

REDACTED

criminal activity by government officials. Section 535(b) governs this case, much as it governs the principal issues in the other dispute in which the OIC has petitioned for certiorari before judgment, *United States v. Clinton*, No. 97-1924. See *United States v. Arthur Young & Co.*, 465 U.S. 805, 816-17 (1984); *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-17 (1981).

6. Even apart from § 535(b), however, the Secret Service has failed to demonstrate the sort of “reason and experience” that are needed to support its argument that judicial recognition of the proposed “protective function privilege” is mandated. Outside of this litigation, the “protective function privilege” has never been recognized, cited, or even discussed by any state or federal court, nor has it ever been advocated, opposed, or even so much as alluded to by any learned commentator. That is, the legal “reason and experience” that Rule 501 and this Court’s cases require is simply not present here. In short, the legal basis for the asserted privilege is tenuous in the extreme, yet this proposed new rule championed by the Department of Justice (and supported by the President himself and officially invoked by the Secretary of the Treasury) is preventing the grand jury from the orderly conduct of its important work.

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REDACTED

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

KENNETH W. STARR
Independent Counsel

MICHAEL L. TRAVERS
Associate Independent Counsel

June 4, 1998

No. 97-1942

IN THE
Supreme Court of the United States
October Term, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. RUBIN, SECRETARY OF THE TREASURY,
and LEWIS C. MERLETTI, DIRECTOR OF THE
UNITED STATES SECRET SERVICE, RESPONDENTS

**PETITION FOR A WRIT OF CERTIORARI BEFORE
JUDGMENT TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITIONER'S REDACTED APPENDIX

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1A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**Misc. No. 98-148 (NHJ)
REDACTED VERSION**

IN RE GRAND JURY PROCEEDINGS

**FILED
MAY 22 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT**

I. Background

Pending before the Court is the motion of the Office of Independent Counsel ("OIC") to compel the testimony of [REDACTED]. These witnesses have refused to answer questions before a grand jury about [REDACTED] [FOOTNOTE REDACTED]. Each witness asserted the "protective function privilege" [REDACTED] [FOOTNOTE REDACTED]. None of the questions at issue relate to the protective techniques or procedures of the Secret Service.

The Secret Service wants this Court to recognize a new "protective function privilege" as a basis for withholding testimony before a federal grand jury. Because this privilege is a novel one, the Secret Service has suggested to the Court what it contends to be the scope of the privilege. The Service characterizes its proposed privilege as an absolute privilege that would preclude the OIC from compelling any testimony regarding information learned by Secret Service agents and officers while performing protective functions in physical proximity to the President where the information would tend to reveal the President's contemporaneous activities. According to the Secret Service, this privilege would encompass the agents or officers' observations of conduct and

of individuals' identities as well as statements that they overheard.

In addition, the Secret Service suggests certain exceptions to its proposed privilege. The protective function privilege would not include observations made or statements overheard by an officer or agent who is not performing a protective function. There would also be an exception allowing testimony for observed actions or overheard statements that were, at the time of their perception, "sufficient to provide reasonable grounds to conclude that a felony has been, is being, or will be committed." Opp. to the Mot to Compel at 2. Finally, the Secret Service declares that compelling circumstances such as national security concerns, might overcome the privilege, but asserts that such circumstances do not exist here.

II. The Protective Function Privilege

The Secret Service asks the Court to recognize a new protective function privilege pursuant to Federal Rule of Evidence 501. Rule 501 provides that evidentiary privileges "shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience." The Supreme Court has interpreted Rule 501 to require courts to consider: 1) whether the asserted privilege is historically rooted in federal law, 2) whether any states have recognized the privilege; and 3) public policy interests. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1, 12-15 (1996); *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189 (1990); *Trammel v. United States*, 445 U.S. 40 (1980); *United States v. Gillock*, 445 U.S. 360 (1980). With respect to public policy interests, courts should consider whether the new privilege "promotes sufficiently important interests to outweigh the need for evidence." *Jaffee*, 518 U.S. at 9-10.

Although Rule 501 gives courts the authority to recognize new privileges, the Court begins by noting that privileges "are not lightly created nor expansively construed." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Indeed, the Supreme Court has recognized only one new evidentiary

privilege and has rejected several attempts to create new privileges. See *Jaffee*, 518 U.S. at 15 (recognizing a patient-psychotherapist privilege); *University of Pennsylvania*, 493 U.S. at 195 (rejecting a university privilege for tenure review files); *Trammel*, 445 U.S. at 53 (rejecting extension of the marital communications privilege to voluntary testimony); *Gillock*, 445 U.S. at 373 (rejecting a state legislator privilege); *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) (rejecting a work product privilege for accountants); *Herbert v. Lando*, 441 U.S. 153 (1979) (rejecting editorial process privilege for the press); *Couch v. United States*, 409 U.S. 322 (1973) (rejecting an accountant-client privilege). The Supreme Court was willing to recognize a new privilege only when the privilege had some history in federal law and enjoyed broad state support, and public policy considerations weighed strongly in favor of recognizing it.

A. Federal History

The Court has found no federal history of a protective function privilege and counsel for the Secret Service conceded during oral argument that no court has ever recognized the privilege. Motion Hearing in Misc. No. 98-148, May 14, 1998, Tr. at 20. The Court finds no constitutional basis for recognizing a protective function privilege.¹ In addition, there is no history of the privilege in federal common or statutory law. Only two statutes are even relevant to the asserted protective function privilege. See 18 U.S.C. § 3056(a); 28 U.S.C. § 535(b). Section 3056(a) compels the President and Vice President to accept the protection of the Secret Service but says nothing about an evidentiary privilege. In mandating that the Secret Service be near the President at all times, Congress must have realized that Secret Service members would inevitably witness the President's conduct and hear his communications. Nevertheless, Congress did not create a protective function privilege.

¹ The Secret Service has not asserted a constitutional basis for the claimed privilege. Tr. at 4.

By contrast, under section 535(b), Congress imposed a duty on all executive branch personnel to report criminal activity by government officers and employees to the Attorney General. According to section 535(b), the duty to report criminal activity applies “unless . . . as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint” 28 U.S.C. § 535(b)(2) (emphasis added). Secret Service employees are not only executive branch personnel subject to section 535(b), but they are also law enforcement officers. Despite this, the Secret Service contends that section 535(b) does not conflict with the asserted protective function privilege because the Attorney General supports this privilege for a specified class of information. The OIC argues that section 535(b) prohibits this Court from recognizing such a privilege because to do so would override the will of Congress.² Although the Court does not find that section 535(b) prohibits recognition of the privilege given the exception incorporated into the statute, the Court does find that a protective function privilege would contradict the goal of section 535(b), which is to have executive branch employees report criminal activity by government officials. In short, sections 535(b) and 3056(a) suggest that Congress did not intend for there to be a protective function privilege and the Supreme Court has found the intent of Congress to be a significant factor in rejecting new privileges. See *University of Pennsylvania*, 493 U.S. at 189; *Arthur Young*, 465 U.S. at 816. If Congress now believes such a privilege is warranted, it, unlike this Court, is free to create one.

The fact that the protective function privilege enjoys no support in federal law makes it distinguishable from the patient-psychotherapist privilege recognized in *Jaffee*. The Secret Service relies heavily on *Jaffee* as support for

² The OIC argues that Article III courts cannot create federal common law if Congress has already spoken on the subject, citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) and *District of Columbia v. Air Florida*, 750 F.2d 1077, 1085 (D.C. Cir. 1984).

recognizing a new protective function privilege; however, unlike the protective function privilege, the patient-psychotherapist privilege had some federal history. A few U.S. courts of appeals had recognized a patient-psychotherapist privilege and the privilege was among the nine specific privileges recommended by the Advisory Committee in its proposed privilege rules. See *Jaffee*, 518 U.S. at 7, 9 n.7, 14. The Supreme Court's holding in *Gillock* that "Rule 501 did not include a state legislative privilege relied, in part, on the fact that no such privilege was included in the Advisory Committee's draft." *Jaffee*, 518 U.S. at 14-15 (citing *Gillock*, 445 U.S. at 367-68). As the Supreme Court explained, the absence of a state legislative privilege in the proposed rules "suggest[ed] that the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism." *Gillock*, 445 U.S. at 367-68. Thus, according to *Jaffee* and *Gillock*, the fact that the protective function privilege is not among the nine recommended privileges provides further support for not creating one. Even in *Trammel*, a case in which the asserted spousal privilege had "ancient roots" and was included among the nine proposed privilege rules, the Supreme Court refused to apply the spousal privilege to voluntary testimony. 445 U.S. at 43, 47.

Although the protective function privilege has no history in federal law, there is some history of Secret Service agents testifying in judicial and non-judicial proceedings with respect to President Nixon's taping system and John Hinckley's attempted assassination of President Reagan. In those two instances, the Secret Service did not assert a protective function privilege. In fact, the Secret Service has never claimed an evidentiary privilege prior to this time. The Secret Service claims this is because no prosecutor has ever compelled testimony from Secret Service agents before. Tr. at 20. While this may be so, the fact remains that Secret Service agents have been willing to testify in the past and have never before felt the need to assert a privilege. The Court finds that the Secret Service's own history, the lack of any constitutional or statutory support for the claimed privilege,

and the federal case law regarding newly asserted privileges under Rule 501 all weigh against recognizing the privilege.

B. State History

No state has ever recognized a protective function privilege or its equivalent. The absence of any state support for the privilege not only militates against recognizing one, but also distinguishes it significantly from the patient-psychotherapist privilege recognized in *Jaffee*. One of the Supreme Court's primary reasons for recognizing the patient-psychotherapist privilege was the fact that all 50 states and the District of Columbia already recognized such a privilege. *See Jaffee* 518 U.S. at 12. As the Supreme Court explained: "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Id.* at 13. Likewise, the lack of any state support for the protective function privilege indicates that "reason and experience" do not warrant recognizing it. This conclusion is supported by the Supreme Court's refusal to recognize a confidential accountant-client privilege in part because "no state-created privilege has been recognized in federal cases." *Couch*, 409 U.S. at 335. The fact that every state has a governor in need of protection and that no state has ever recognized a protective function privilege provides a compelling reason for not creating the new privilege.

C. Public Policy Considerations

Because the proposed privilege lacks any historical basis, the Secret Service vigorously asserts public policy considerations in support of the protective function privilege. The Secret Service surrounds the President with a zone of protection at all times and declares that the success of this protection relies on complete and unquestioned proximity to the President. If an agent were compelled to testify about observations made while protecting the President, the Secret Service claims that current and future Presidents would inevitably distance themselves from Secret Service personnel, thereby endangering the life of the Chief Executive. In support of their assertions, the Secret Service presented the affidavits of the current Director of the Secret Service, Lewis

Merletti, and two former Directors, John Magaw and Eljay Bowron, as well as a letter from President Bush. The Secret Service did not present any letter or declaration from President Clinton.

The physical safety of the President of the United States is clearly of paramount national importance. The Court is in absolute agreement with the Department of Justice that presidential assassinations are horrible tragedies, devastating for the country both emotionally and politically. While the concerns of the Secret Service are legitimate, the Court is not convinced that compelling Secret Service personnel to testify before a grand jury regarding evidence of a crime would place Presidents in peril.³

The Court does not doubt that physical proximity between Secret Service personnel and the President is crucial to the President's safety. However, it does not accept the suggestion that the possibility that agents could be compelled to testify before a grand jury will lead a President to "push away" his protectors. When people act within the law, they do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury. It is not at all clear that a President would push Secret Service protection away if he were acting legally or even if he were engaged in personally embarrassing acts. Such actions are extremely unlikely to become the subject of a grand jury investigation. The claim of the Secret Service that "any Presidential action—no matter how intrinsically innocent—could later be deemed relevant to a criminal investigation," *Opp. to the Mot. to Compel* at 28, is simply not plausible.

The Court notes that Secret Service agents have written books about their protective experiences and given extensive information to authors who have written tell-all books. *See,*

³ Even if a President might distance himself on occasion from the Secret Service out of concern that its agents or officers might testify against him, the Court simply has no legal basis for recognizing the protective function privilege. As explained above, there is no legal support for creating this new privilege.

e.g., Seymour Hersh, *The Dark Side of Camelot* (1997) (describing four agents' revealing observations of President Kennedy). There is no indication that those published accounts have caused Presidents to push Secret Service agents away because information about their private lives might become public.

The Court is not ultimately persuaded that a President would put his life at risk for fear that a Secret Service agent might be called to testify before a grand jury about observed conduct or overheard statements. The President has a very strong interest in protecting his own physical safety. Secret Service Director Merletti states that each incoming President initially resists the intense protection provided by the Secret Service. Merletti Decl. at ¶ 20. Agents do, however, successfully demonstrate to the President that proximity is essential. *Id.* The Court has great confidence in the ability of the Secret Service to continue its education and inform its protectees of the vital importance of close proximity, just as this Court has been informed.

Finally, the Secret Service is composed of public employees who are law enforcement officers. The Secret Service's law enforcement obligation and its duty to report criminal activity under 28 U.S.C. § 535(b) provide persuasive policy reasons in favor of compelling grand jury testimony.

In the end, the policy arguments advanced by the Secret Service are not strong enough to overcome the grand jury's substantial interest in obtaining evidence of crimes or to cause this Court to create a new testimonial privilege. Given this and the absence of legal support for the asserted privilege, this Court will not establish a protective function privilege.

D. Who Must Assert the Privilege

While the Court declines to recognize a protective function privilege, it must note that even if so inclined, the privilege has not been properly invoked. The President has not himself invoked the protective function privilege nor has he instructed the witnesses to invoke it. Instead, Robert Rubin, the Secretary of the Department of the Treasury, has

formally asserted the privilege. Rubin Decl. at ¶ 4. The Director of the Secret Service states that he has not consulted with the President or the White House on this issue. Merletti Decl. at ¶ 2. The OIC has requested that the President personally waive this privilege, Reply Mem. in Support of Mot. to Compel at Exh. B, but there is no known response.

Because there is no law on the protective function privilege, the issue of who must assert the privilege is not settled. The Secret Service argues that the policy reasons behind the proposed protective function privilege parallel those behind the state secrets privilege. Because the head of an agency must assert the state secrets privilege, *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953), the Secret Service contends that the Secretary of the Department of the Treasury is the appropriate person to assert this privilege. However, no state secrets are involved in this matter. The proposed privilege more closely resembles the attorney-client privilege. The theory of the Secret Service is that, if the agency protected the confidentiality of presidential activities, the President would not hide any of his private actions from his protectors. The President's confidences are theoretically at issue under the protective function privilege, just as the client's confidences are at issue under the attorney-client privilege. For these reasons, there is a question as to whether the alleged privilege has been properly presented.

III. Conclusion

For the reasons given above, this Court will grant the motion of the Office of Independent Counsel to compel [REDACTED] to testify regarding the matters for which they asserted the putative protective function privilege. An appropriate Order will follow.

/s/ _____
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

May 22, 1998

10A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**MISC. NO. 98-148 (NHJ)
REDACTED VERSION**

IN RE GRAND JURY PROCEEDINGS

FILED
MAY 22 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Pending before the Court is the motion of the Office of Independent Counsel ("OIC") to compel the testimony of [REDACTED]. These witnesses have refused to answer questions before a grand jury, asserting the protective function privilege. [REDACTED]. Upon consideration of the OIC's motion to compel, the opposing and supporting memoranda, and the oral argument of counsel, it is this 22nd day of May 1998,

ORDERED that the motion be, and hereby is, granted with respect to the questions to which the [REDACTED] witnesses asserted the protective function privilege; and it is further

ORDERED that [REDACTED].

/s/ _____
NORMA HOLLOWAY-JOHNSON
CHIEF JUDGE

11A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Misc. No. 98-148 (NHJ)

IN RE GRAND JURY SUBPOENA

FILED UNDER SEAL

**DECLARATION OF LEWIS C. MERLETTI
DIRECTOR, UNITED STATES SECRET SERVICE**

Introduction

1. I, Lewis C. Merletti, serve as the Director of the United States Secret Service (the "Secret Service"), an executive branch, law enforcement bureau of the Department of the Treasury. As Director of the Secret Service, it is my ultimate responsibility to protect the life and safety of the President of the United States.

2. I submit this declaration in support of the Opposition of the United States to the Independent Counsel's Motion to Compel the testimony of two United States Secret Service Uniformed Division Officers regarding what they and other Secret Service personnel might have witnessed while they were protecting the President, as well as to compel the testimony of the Chief Counsel of the Secret Service regarding information he may have obtained from these two officers. In response to the Independent Counsel's motion, I hereby state for the record that I have not been directed by the President of the United States or anyone at the White House regarding this opposition to the Motion to Compel or even regarding the general issue of the protective function privilege. Nor have I consulted with the President or the White House regarding this issue. Rather, it is my firm belief, as Director of the United States Secret Service, that using Secret Service protective personnel as witnesses concerning the activities of a President will substantially undermine, if not destroy, the relationship of confidence and trust that must exist between the Secret Service and a President for the Secret

Service to successfully fulfil its mission. If our Presidents do not have complete trust in the Secret Service personnel who protect them, they may push away the Service's "protective envelope," thereby making them more vulnerable to assassination. Because I believe that the Independent Counsel's Motion to Compel represents a threat to the safety of this and future Presidents, I respectfully request an opportunity to be heard in person on this subject, so I can describe the imperative need for a protectee to have a relationship of complete and absolute trust with Secret Service personnel performing their protective function. Moreover, there are certain details that I believe are relevant to the Court's analysis that, while not easily and appropriately included in a written submission, can be presented in an oral, sealed presentation to the Court.

Background

3. I was appointed Director of the Secret Service on June 6, 1997. Before joining the Secret Service, I served three years in the United States Army, including a one-year tour of duty with the 5th Special Forces Group in Vietnam. Since leaving the Army, I have served as a career Secret Service Special Agent for more than 23 years. My appointment as the 19th Director of the Secret Service continued the long-standing tradition that the lead executive of our agency is selected from within the ranks of our career special agents. I was appointed to the Service on November 25, 1974, and have had the honor of serving for Presidents Gerald Ford, Jimmy Carter, Ronald Reagan, George Bush, and Bill Clinton. During the course of my career, I have held numerous operational and supervisory positions in the Secret Service. Within the Secret Service, the units with primary responsibility for protecting the life of a President are the Presidential Protective Division ("PPD") and the Secret Service Uniformed Division ("Uniformed Division" or "UD"). I have been assigned to the Presidential Protective Division under Presidents Reagan, Bush, and Clinton.

4. I first worked as a PPD Special Agent from February 19, 1984 through December 6, 1986. I was

promoted to the Assistant Special Agent in Charge on January 7, 1988, and served in that capacity through March 23, 1991. I served as Deputy Special Agent in Charge from March 20, 1994 until my appointment on September 3, 1995 as the Special Agent in Charge ("SAIC") for the Presidential Protective Division. I served as the Special Agent in Charge for the Presidential Protective Division during the period September 1995 through February 1997. For the period from February 1997 through June 1997, just prior to being appointed Director of the Secret Service, I was the Assistant Director in charge of all Secret Service training functions.

5. In my current capacity as Director, I am responsible for supervising all aspects of the Secret Service's mission, including the agency's protective, as well as criminal investigative, functions. As Director, I oversee all administrative and operational components of the Secret Service, and I am accountable for the successful completion of all of the Service's functions. Moreover, in light of my more than two decades of experience at the Secret Service -- including most prominently my experience serving on the Presidential Protective Division in close proximity to Presidents Reagan, Bush, and Clinton -- I can describe firsthand the protective operations of the Secret Service, the truly extraordinary relationship of trust and confidentiality that must exist between the Service and the Service's statutory protectees, and the grave, and, in my view, unacceptable, risk that would ensue if this relationship of trust and confidentiality were to be compromised.

6. It is my belief that an explanation of the history of the Secret Service, its statutory responsibilities and structure, and the relationship that must exist between the Secret Service and its protectees, will assist the Court in assessing whether to grant the Independent Counsel's Motion to Compel.

History of the Secret Service's Protective Philosophy

7. Unlike many foreign protective agencies, the Secret Service has developed a protective envelope philosophy emphasizing a "cover and evacuate," as opposed to a "counter-offensive," method of protection. Under the cover and evacuate method, agents and officers surround each protectee with an all-encompassing zone of protection on a twenty-four hour a day, 365-day a year basis. As I will explain below, our protective philosophy relies on complete and unquestioned access and proximity to our protectees, particularly the President. The Secret Service has developed its protective envelope method of protection from bitter historical experience.

8. The assassination of the President of the United States is, quite literally, a cataclysmic event in world history. It is also, of course, the worst possible incident that can occur on the Secret Service's watch. For this reason, it is the practice of the Secret Service to review and assess all assassination attempts, wherever and whenever they occur. Indeed, in an effort to stress the critical importance of our protective envelope theory of protection, we teach our protective personnel about America's historical experience with assassinations and assassination attempts.

9. The Secret Service was created on July 5, 1865, as the first general law enforcement agency within the federal government. During the period from the end of the Civil War through 1901, three presidents were assassinated: President Abraham Lincoln on April 14, 1865, President James A. Garfield on July 2, 1881, and President William McKinley on September 6, 1901. In retrospect, the assassination of President McKinley has served as a watershed moment in the history of the Secret Service and demonstrates the overwhelming need for the Service to maintain close proximity to the President at all times.

10. On September 6, 1901, President McKinley attended the Pan-American Exposition. As we understand from historical records, a receiving line was set up for

members of the public to greet the President. By prior arrangement, a Secret Service agent was to stand directly by the President's side as he greeted the public. At the request of the president of the Pan-American Exposition, who wished to be standing next to the President, the Secret Service agent was moved away from President McKinley's side. According to our understanding, it was only a matter of minutes before President McKinley was shot at point-blank range. Given the nature of this assassination -- with the assailant approaching the President with his hand wrapped rather obviously in a handkerchief in an attempt to hide his gun -- there is a substantial likelihood that an agent or officer within close proximity of the President would have averted the assassination. This was the first, but unfortunately not the last, example of an assassination occurring after the Secret Service was moved away from a protectee.

11. I have attached, as Exhibit A to this Declaration, photographs of President John F. Kennedy's visit to Tampa, Florida on November 18, 1963. We use these photographs, and the ones attached as Exhibit B, in our training exercises. Exhibit A demonstrates the lengths to which protective personnel have been forced to go to try to maintain proximity to the President. In the photographs contained in Exhibit A, agents are kneeling on the running board of the Presidential limousine while the vehicle was traveling at a high rate of speed. I can attest that this requires extraordinary physical exertion. Nevertheless, they performed this duty in an attempt to maintain close physical proximity to the President. Exhibit B, by contrast, scarcely needs any introduction. It is a series of photographs of the Presidential limousine, taken just four days later, on November 22, 1963, in Dallas, Texas. As can be seen, at the instruction of the President, Secret Service agents had been ordered off of the limousine's running boards. An analysis of the ensuing assassination (including the trajectory of the bullets which struck the President) indicates that it might have been thwarted had agents been stationed on the car's running boards. In other words, had they been able to maintain close proximity to the President during the motorcade, the assassination of John F. Kennedy might have

been averted. Exhibit C contains a series of photographs taken during the actual assassination that demonstrate how critical and tragic the absence of proximity to the protectee can be.

12. One need only contrast the successful assassinations of Presidents McKinley and Kennedy with the unsuccessful assassination attempt on President Reagan to understand that unfettered close proximity to the President can, quite literally, mean the difference between life and death. As Exhibit D demonstrates, the Secret Service's protective envelope was in place on March 30, 1981, when John Hinckley attempted to assassinate President Reagan. As our analysis of the assassination attempt demonstrates, the assassination was prevented because the Secret Service was in close proximity to the President and immediately shielded the President's body and pushed him into the awaiting limousine. One agent in particular, Agent Tim McCarthy, acted as a human shield, positioning his body to intercept a bullet intended for the President. At the same time, Special Agent In Charge Jerry Parr, positioned immediately behind the President, literally maneuvered President Reagan from a standing position into the backseat of the Presidential limousine. Immediately thereafter, SAIC Parr covered the President's body with his own, as the limousine sped away. As this episode demonstrates, close proximity to the protectee is an absolute necessity if the Secret Service is to succeed in protecting the life and physical security of a President. Indeed, it is no exaggeration to say that the difference of even a few feet between a President and his protective detail could mean the difference between life or death.

13. As I will be able to explain more fully if I am given the opportunity to personally address the Court, the Secret Service's method of protection contrasts dramatically with philosophies shared by other protective agencies throughout the world. Some of those agencies place great emphasis on the aggressive "overwhelm the attacker" or "counter-attack" method, and less emphasis than the Secret Service on maintaining close proximity to the protectee. Again, if given the opportunity to address the Court, I will provide graphic

examples of world leaders who have been assassinated by people who have managed to get in close proximity to them. I provide these examples to stress my basis for believing that maintaining close and unfettered access to our protectees is of the utmost importance to the national security of the United States.

Statutory Responsibilities and Structure

14. The Secret Service's responsibility to protect the life of a President is codified in federal statute. Pursuant to title 18, United States Code, section 3056 (18 U.S.C. § 3056), the Secret Service is mandated by law to protect this nation's highest constitutional officers, including the President and Vice President and, when applicable, the President-elect, and the Vice President-elect. By the express language of 18 U.S.C. § 3056(a), these individuals may not decline the statutory protection mandated by Congress. The Secret Service is also charged with the protection of the immediate families of the President and Vice President, former Presidents and their families, and the major Presidential and Vice Presidential candidates and, within 120 days of a Presidential election, their spouses. Likewise, pursuant to 18 U.S.C. § 3056, the Secret Service is responsible for protecting visiting heads of foreign states or governments, other distinguished visitors to the United States, and official representatives of the United States performing special missions abroad.

15. The protection of a President and the First Family necessarily involves ensuring that the White House Complex is at all times completely secure. Pursuant to title 3, United States Code, section 202 (3 U.S.C. § 202), the United States Secret Service Uniformed Division is charged with protecting the President and the White House Complex. Uniformed Division officers form an integral part of a President's protective envelope as he moves both within the White House Complex, and in protective movements outside the White House Complex. Indeed, UD officers do not always work in uniform and, as a result, may appear to be indistinguishable from other protective personnel. Among other things, officers

of the Uniformed Division secure the protective perimeter and interior of the White House Complex, operate specialized protective function units such as the Counter Sniper unit and the Emergency Response Team, and play an integral role in contingency plans to clear routes required for the immediate relocation of a President in case of an emergency or attack upon the White House Complex. In addition, UD officers travel with a President to provide protective support. In short, PPD agents and Uniformed Division officers combine to form a moving protective perimeter surrounding a President at all times. I have previously alluded to the extraordinary lengths to which the Secret Service will go to maintain this proximity to a President. Indeed, agents will even wear disguises so that they can unobtrusively stand next to, or near, a President. As Exhibit E 1 through 3 demonstrate, agents have dressed as major league umpires, soldiers, engineers, academics, and priests, in an effort to achieve seamless proximity to a protectee regardless of the context. Moreover, as Exhibit E 4 through 7 reflect, Uniformed Division Officers, both in uniform and in business attire, similarly conduct their duties proximate to the President's person. In fact, as these photos reflect, at times Uniformed Division Officers are positioned most proximate to the President. As a result, wherever a President is located, the Presidential Protective Division and Uniformed Division must be prepared to instantaneously react to protect him in case of attack. This applies with equal force within the White House, where personnel must be able to provide cover for and perhaps relocate a President within seconds of any threatening event within the White House Complex. As history has demonstrated, there have been attempts to encroach upon the White House Complex both by air and by land. Indeed, in 1950, Leslie Coffelt, a member of the White House Police (the predecessor to the current Uniformed Division) lost his life while thwarting the attempted assassination of President Harry Truman, at a time when President Truman was residing at the Blair House.

16. The Secret Service's statutory responsibilities are carried out by various organizational components. All of these organizational components work together to provide a

complete 24-hour-a-day, 365-day-a-year protective envelope surrounding our protectees. I have already noted that a President is protected by the Presidential Protective Division as well as officers from the Uniformed Division. Other Secret Service protective personnel, such as highly trained technical support personnel providing explosives detection, audio countermeasures, and bio-hazard and other threat countermeasures, will also have occasion to be near or in the presence of a President. The large contingent of agents and officers who protect a President is provided with specialized integrated training that is literally unparalleled in terms of rigor and detail. Much of the training provided to UD officers (from firearms to medical training) is identical to that provided to PPD agents. Agents and officers of the PPD and UD participate together in unique simulated crisis training scenarios. These exercises present Secret Service personnel with a variety of emergency situations involving Secret Service protectees. Agents and officers are trained how to be ready to react properly, and in close conjunction with one another in times of emergency. Because agents of the PPD and UD officers must remain alert at all times, their ranks are constantly shifted. Both the PPD and UD provide 24-hour protection to a President by operating in a series of structured shifts. However, the specific duties of each Secret Service agent or officer assigned to a shift do not remain static. So as to maximize the greatest protective vigilance, many special agents and officers within a shift periodically "push" (or move) to the next in a series of assignments. Without providing specific details, this fluid nature of the protective envelope and specific protective tasks necessarily implies that, for example, an agent may be just outside the oval Office at the commencement of a shift, and at a more remote post at the end of a shift.

17. As should be clear, the protection of a President is only accomplished through the coordinated efforts of scores of dedicated Secret Service protective personnel. As such, the protective envelope that the Secret Service maintains around a President is effective because it has many overlapping and interlocking functions. Each of these functions and tasks is

critical to the accomplishment of the mission, whether a President is within the security perimeter of the White House complex, or traveling to a remote site. And underlining all these protective efforts is a simple proposition: the Secret Service cannot keep a President safe if its agents or officers are not close to him, and to be welcome in such close proximity to a President, they must enjoy his unqualified trust.

The Protective Relationship

18. With this background in mind, I will attempt to explain the extraordinarily unique relationship that must exist between the Secret Service and a Presidential protectee. Having served on the PPD's of Presidents Reagan, Bush, and Clinton, I can describe this phenomenon in specific detail. There must be an atmosphere of complete trust between a President and his protective detail. This level of trust and confidence cannot be overestimated. For the Secret Service to fulfill its mission, the very movements of a President frequently must be cleared by the Special Agent in Charge of the PPD. Thus, the SAID must, at any given moment, quite literally be in a position to put his hands on the hips of a President to move him in a particular direction out of harm's way. Indeed, to ensure the safety of a President, the SAIC must have the complete discretion to initiate physical contact with a President at any time. We are trained in what we call "hands on" pivotal body mechanics. Stated simply, this means that, any time it becomes necessary to do so, we are trained to grab a President's pelvis and hips to shift him in the desired direction. I have attached, as Exhibit F, a variety of photographs demonstrating the Service's "hands on" approach to protection. By the same token, the level of trust must be so great that a President will be willing to change his entire travel plans if the SAIC deems it necessary to do so. Without revealing any confidences, I can state that certain events, stops, and, indeed, entire Presidential visits have been canceled, when the security of a President could not be guaranteed. Indeed, a President must rely on the Secret Service to decide such things as when and where he can

safely exit his presidential limousine and which routes he can safely take on foot. We would have great difficulty protecting a President's safety if we did not have his complete confidence where matters of technical security are concerned.

19. A trusting and confidential relationship with a President, and the physical proximity permitted by that relationship, is also crucial to the Secret Service's ability to assess and react promptly to signs of physical distress. On more than one occasion, a President has encountered medical difficulties that were recognized by members of the Secret Service either because the protective personnel were familiar enough with the President to understand the symptoms or because it was obvious that the President was having a medical problem. In one publicized instance, on September 15, 1979, President Carter was participating in a ten kilometer race in Catoctin Mountain National Park when it became apparent to the Secret Service protective personnel that the President was having difficulty running. One agent was so close that he was able to grab and steady the President as the President began to falter. I have attached as Exhibit G a photograph depicting this incident. In another instance, a member of the Secret Service recognized a President exhibiting signs of medical difficulty. The Secret Service protective employee who recognized the problem was able to do so because of the close and constant proximity he had over a long period of time with the President. This relationship enabled the employee to alert a physician towards what ultimately turned out to be a medical situation requiring treatment. Accordingly, the proximity of the Secret Service to a President is necessary in times of medical emergency, as well as emergencies stemming from outside threats.

20. It has been my experience, serving on the protective details for three different Presidents, that each incoming President demonstrates an initial tendency to resist the close protective envelope in which we want to place him. Even though maintaining close proximity is particularly crucial during a transition period, it has been my experience that each incoming President does not sufficiently appreciate the risks

he is facing. Quite naturally, they tend to view Secret Service personnel (both inside and outside of the White House) as an obstacle to their privacy and a barrier between them and the American people. For this reason, a natural educational process must take place, during which the Special Agent in Charge must convey how essential proximity is. This is true even for those Presidents who have already had Secret Service protection in a prior capacity. After all, although the protection afforded all of our protectees is rigorous, the President of the United States receives a level of protection that is unparalleled in terms of both intensity and scope. This process is already exceedingly difficult; it would be dramatically compounded if protectees were given reason to be concerned that protective personnel might be called upon to testify about what they were able to see or hear while in such close proximity to their protectees.

21. During my years working on the Presidential Protective Division, I have heard and observed innumerable confidences of the most sensitive nature, regarding both matters of state as well as matters of a personal nature to my protectees. It was at all times my understanding that I would maintain absolute secrecy regarding any and all confidences that I learned in my capacity as a member of the Secret Service in close proximity to a President. Indeed, this was also the clear understanding of my protectees. I have a distinct recollection of having been next to one President when he was being briefed on troop movements in the midst of a war. Before speaking, the aide expressed concern about expressing such highly sensitive, highly classified information in my presence. But the President assured the person that I would maintain complete silence over everything I heard, and the briefing went forward without further interruption. I can recall similar episodes when I overheard or observed details of a highly personal nature because of my close proximity to a President.

22. The trust that the Secret Service must inspire in a President of the United States is twofold. First, a President must trust us completely where matters of security are

concerned. A President must also trust that his activities -- both in private and public -- will remain in complete confidence. For the reasons stated, the Secret Service must have unquestioned access and proximity to a President in order to provide the necessary level and intimacy of protection to ensure his safety. Conversely, protectees must know that their actions and words are private and confidential despite the close proximity of their protection.

23. In that regard, I have attached, as Exhibit H, a letter recently written to me by former President George Bush, prompted by newspaper coverage regarding the Secret Service being asked to testify in this matter. In his letter, former President Bush stresses the importance of confidentiality to the Secret Service's mission. In expressing his view that Secret Service agents should not be forced to testify in this matter, former President Bush states: "What's at stake here is the confidence of the President in the discretion of the USSS. If that confidence evaporates the agents, denied proximity, cannot properly protect the President." Former President Bush states that he "allowed the agents to have proximity first because they had my full confidence and secondly because I knew them to be totally discreet and honorable." Former President Bush's letter also states to me: "I can assure you that had I felt they would be compelled to testify as to what they had seen or heard, no matter what the subject, I would not have felt comfortable having them close in."

24. The history of the Secret Service provides a strong foundation for this tradition of unequivocal trust. The motto of the United States Secret Service is "WORTHY OF TRUST AND CONFIDENCE." This tenet is so central to our mission it is emblazoned in the Secret Service Commission Book. I feel so strongly about this creed that when I speak to protective personnel upon their graduation, I tell them that the "most important" factor in the Secret Service Commission Book is the one in which "I commend you to the entire world as being worthy of TRUST and CONFIDENCE." As I state, "the phrase, 'BEING WORTHY OF TRUST AND

CONFIDENCE,' is the absolute heart and soul of the United States Secret Service." This trust and confidence cannot be situational. It cannot have an expiration date. And it must never be compromised.

25. This is why the Secret Service has historically maintained that protective personnel should not, and should not be compelled to, divulge information, whether heard or observed, that is obtained as a result of their protective responsibilities. This confidentiality is a matter of long-lasting institutional culture, and serves as an absolutely necessary component to establishing and maintaining a constant and proximate relationship to any protectee. I am attaching as Exhibit I to this Declaration a true and correct copy of a Secret Service Memorandum titled "Protection for the President," which the Archivist of the Secret Service believes was drafted in 1910. As this Memorandum makes clear, the attitude of the Secret Service has remained unaltered with respect to the need for maintaining absolute confidence over Presidential observations. In the words of the Memorandum, which was submitted to the Secretary of the Treasury:

I wish to say that the men of this service detailed at the Presidential home in Washington or elsewhere are instructed not to talk of anything they may see or hear. So far as the actions of the President and his family and social or official callers are concerned the men are deaf, dumb and blind. In all the years this service has been maintained at the White House and the freedom with which many important public matters have been discussed in their presence, there has never been a leak or betrayal of trust. * * * *
Responsibility in the matter of the safety of the President . . . was accepted willingly when thrust upon us in an emergency, and from the beginning has been regarded as a sacred trust, overshadowing in importance all other duties and responsibilities.

See Exhibit I at 7, 12-13. Given the Secret Service's history of maintaining absolute secrecy regarding information obtained by its protective personnel while in proximity to the President,

our protectees have operated under a belief that their statements and actions occurring in the presence of Secret Service protective personnel are absolutely confidential.

The Independent Counsel's Motion to Compel

26. To the best of my knowledge, the Independent Counsel's Motion to Compel is unprecedented because it seeks to compel before the grand jury testimony from current Secret Service personnel regarding information obtained while they or other Secret Service protective personnel were stationed in close proximity to the President. I wish to express my profound concerns regarding the impact that compliance with this Motion to Compel would have upon the Secret Service, both at this time and in the future. In my view, compelling Secret Service employees to divulge either communications overheard or actions observed as a result of protective duties would impose a permanent and devastating impact upon the Secret Service's ability to provide protection to any of our protectees. Indeed, I firmly believe that allowing this testimony to go forward will compromise the entire protective fabric enveloping a President, whether at the White House Complex or on the road. For this reason, I believe that denying this Motion to Compel clearly serves the national security interests of the United States.

27. I have previously described the unquestioned and unparalleled relationship of trust and confidence that has historically existed between a President and the Secret Service. In my view, if any President of the United States were given reason to doubt the confidentiality of actions or conversations taken in sight or hearing of Secret Service personnel, he would seek to push the protective envelope away, or eliminate some of its components, undermining it to the point where it could no longer be fully effective. As I noted earlier, former President Bush has expressed his views to me in this regard. As he assures me in his recent letter, attached as Exhibit H, "had I felt [Secret Service agents] would be compelled to testify as to what they had seen or heard, no matter what the subject, I would not have felt comfortable having them close in." Former President Bush

states that if a President's confidence in the discretion of the Secret Service evaporates, "the agents, denied proximity, cannot properly protect the President." It is indisputable that a single breach of this confidence, or even the prospect of a breach, brought about by the possibility of compelling Secret Service employees to divulge what is seen or heard while protecting a protectee will invariably alter this important relationship permanently and dangerously. Such a disclosure would make this and future Presidents feel reluctant to speak or act candidly with advisors, confidants and others in the presence of Secret Service protective employees. More importantly, it would harm our ability to carry out our statutorily-mandated protective functions in the manner and nature that has been historically established. I believe the very foundation for ensuring the success and security of a President would be irreparably harmed, if not completely destroyed, if such disclosure were compelled. I further believe the inevitable result would be that a current or future protectee would seek to reposition Secret Service protective employees in order to ensure privacy and confidentiality or attempt, under some circumstances, to refuse protection entirely, a particularly problematic issue with regard to a President.

28. This evaluation of the impact upon the Secret Service's protective function cannot be overstated for the simple reason that even the most subtle (perhaps even unconscious) efforts to push away the protective envelope could have disastrous, even deadly, effects upon a President. In this regard, the historical contrast between the successful assassination of President McKinley and the unsuccessful attempt to take the life of President Reagan should prove compelling: distancing Secret Service protective personnel from a President can have irreversible consequences. If, as is now the unbroken practice of the Secret Service, an agent or officer had been in the immediate proximity of President McKinley when he was shaking hands with members of the general public, his assassination might have been thwarted. By contrast, many experts believe that President Reagan's life was saved by a matter of inches. Had the President felt the need to push the protective envelope away by as little as a few

feet, world history might have been irrevocably altered. Although these may be the most dramatic examples, the need to maintain close proximity to the protectee exists on a moment-to-moment basis. Even within the confines of the White House, protective personnel are meticulously trained to be ready, if necessary, to be at a President's side within seconds of any breach of White House security. Such breaches are by no means hypothetical. On October 29, 1994, an individual armed with a semi-automatic weapon opened fire (and discharged 29 rounds) at the White House. President Clinton was in the private residence at the time. Within seconds, Secret Service agents moved to cover the President and move him away from White House windows. Indeed, the agents -- who, of course, did not then know the exact nature of the threat directed against the President -- were moving to cover the President even while rounds were still being fired at the White House. In another highly publicized recent incident, a Cessna airplane crashed onto the South Lawn of the White House, making contact with the South Wall of the Executive Mansion. Once again, for this purpose, I have only provided the most dramatic and recent examples. But there have been scores of unheralded assassination attempts that have been averted because of our well-established techniques and, most of all, because of proximity. Indeed, the Secret Service has had to thwart gate crashers, fence jumpers, and other trespassers who have attempted to penetrate the grounds of the White House Complex. I do not exaggerate, therefore, when I state that maintaining close proximity to a President -- wherever he is, including the White House -- is an absolute necessity if the Secret Service is to succeed in its protective mission.

29. The threat to national security posed by this Motion to Compel extends beyond even a threat to the life of this and future Presidents. By statute, the Service is responsible for protecting visiting heads of foreign states or governments. Quite naturally this is among the most sensitive and significant work performed by the Secret Service. For obvious reasons, if the assassination of a foreign head of state were ever to occur on American soil, the results could be

catastrophic from a national security or foreign relations standpoint. In my opinion, even the possibility that Secret Service agents might be compelled to testify against their protectees could severely impair our ability to protect visiting heads of state. For obvious reasons, this is a highly sensitive issue, but I can state that, within days of the first newspaper stories surfacing that the Independent Counsel might be seeking compelled Secret Service testimony, I was approached by a high-ranking official of a foreign country. I was informed, in no uncertain terms, that, if events developed such that agents were forced to testify regarding observations of their protectees, that foreign nation would seriously consider refusing to allow Secret Service protection in future state visits. If this were to occur, it clearly would have a catastrophic effect on the ability of the Secret Service to complete one of its most important statutory missions -- the protection of the life and safety of foreign dignitaries.

Conclusion

30. In sum, I believe that both reason and experience compel the conclusion that the confidence and unquestioned trust existing in the relationship between the Secret Service and a President warrants the Court's complete and unequivocal protection. Indisputably, based upon historical precedent and compelling policy interests, Secret Service protectees have operated with an expectation that their actions and words are confidential and private despite the close proximity of their protection. In addition, I believe a sound and overarching public interest exists to preserve the integrity of our relationship with our protectees. The Secret Service's ability to safeguard the national security by providing a viable protective envelope around a President and Vice President, their families, and other domestic and foreign leaders, depends on the preservation of that relationship. For all of these reasons, I believe that it is imperative that the protective function privilege be recognized by this Court, and I recommend that the Secretary of the Treasury assert the protective function privilege with respect to the testimony sought to be compelled.

29A

I declare under penalty of perjury, pursuant to 28 U.S.C. Section 1746, that the foregoing is true and correct.

4/21/98
Date

/s/ _____
LEWIS C. MERLETTI
Director

United States Secret Service

30A

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

Division for the Purpose of
Appointing Independent Counsels

Division No. 94-1

FILED
JAN 16 1998
Special Division

In re: Madison Guaranty Savings & Loan Association
Before: Sentelle, Presiding, Butzner and Fay, Senior Circuit
Judges

ORDER

Upon consideration of an oral application for the expansion of jurisdiction of an Independent Counsel provided to this Court on behalf of the Attorney General on January 16, 1998, it is hereby

ORDERED that the investigative and prosecutorial jurisdiction over the following matters be referred to Independent Counsel Kenneth W. Starr and to the Office of the , Independent Counsel is an expansion of prosecutorial jurisdiction in lieu of the appointment of another Independent Counsel pursuant to 593(c)(1):

(1) The Independent Counsel shall continue to enjoy the full jurisdiction initially conferred upon him as a result of the August 5, 1994, order of the Special Division of the Court and all subsequent orders concerning jurisdiction. Pursuant to 28 U.S.C. § 593(c)(1), the Independent Counsel's jurisdiction shall be expanded to include the following:

(2) The Independent Counsel shall have jurisdiction and authority to investigate to the

maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*.

(3) The Independent Counsel shall have jurisdiction and authority to investigate related violations of federal criminal law, other than a Class B or C misdemeanor or infraction, including any person or entity who has engaged in unlawful conspiracy or who has aided or abetted any federal offense, as necessary to resolve the matter described above.

(4) The Independent Counsel shall have jurisdiction and authority to investigate crimes, such as any violation of 28 U.S.C. § 1826, any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, arising out of his investigation of the matter described above.

(5) The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

It is further ORDERED that this document and its contents be and remain UNDER SEAL absent further Order of this Court.

This the 16th day of January, 1998.

Per Curiam
For the Court:

/s/ _____
Marilyn Sargent
Chief Deputy Clerk

TEXT OF RELEVANT STATUTE AND RULE

28 U.S.C. § 535(b) provides that:

Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless --

- (1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or
- (2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

Fed. R. Evid. 501 provides that:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.

No. 98-93

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND
LEWIS C. MERLETTI, DIRECTOR OF THE
UNITED STATES SECRET SERVICE,
Petitioners,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES
IN OPPOSITION

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QUESTION PRESENTED

Whether, under Fed. R. Evid. 501, this Court should create a new common-law "protective function privilege" that would authorize law enforcement officers of the United States Secret Service to refuse to testify before a federal grand jury.

(i)

PARTIES TO THE PROCEEDING

The parties are the United States, represented by Kenneth W. Starr, Independent Counsel; Robert E. Rubin, Secretary of the Treasury, in his official capacity; and Lewis C. Merletti, Director of the United States Secret Service, in his official capacity.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

No. 98-93

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND
LEWIS C. MERLETTI, DIRECTOR OF THE
UNITED STATES SECRET SERVICE,
Petitioners,

v.

UNITED STATES OF AMERICA

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) and the memorandum opinion and order of the district court (Pet. App. 15a-27a) are not yet reported. The orders of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc (Pet. App. 28a-34a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1998, and a petition for rehearing and suggestion for rehearing en banc was denied on July 16, 1998. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE AND STATUTES INVOLVED

Federal Rule of Evidence 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

28 U.S.C. § 535(b) provides:

Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency

18 U.S.C. § 3056(a) provides:

Under the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect the following persons: (1) The President

STATEMENT

The United States, represented by the Office of Independent Counsel Kenneth W. Starr ("OIC"), filed a motion to compel officers of the Secret Service's Uniformed Division to testify before a federal grand jury sitting in the District of Columbia. That grand jury is investigating "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential

witnesses, attorneys, or others concerning the civil case *Jones v. Clinton.*" Pet. App. 97a. The district court granted the motion to compel, and the court of appeals affirmed.

1. Monica Lewinsky is a former White House intern and employee of the White House's Office of Legislative Affairs. In December 1997, Ms. Lewinsky was placed on a list of witnesses to be called by Paula Jones in the *Jones v. Clinton* litigation and was served with a subpoena requiring her to testify at a deposition in that case. On January 7, 1998, Ms. Lewinsky executed an affidavit representing under penalty of perjury that she had not had a sexual relationship with President Clinton.

This Office subsequently received allegations (i) that Ms. Lewinsky's affidavit was false because she had in fact had a sexual relationship with President Clinton; (ii) that a friend of the President had advised Ms. Lewinsky on how to respond to her subpoena in the *Jones* case, found an attorney to represent her, and helped her find a new job; and (iii) that Ms. Lewinsky had tried to persuade Linda Tripp, a witness in the *Jones* suit, to commit perjury in connection with that case. On January 15, 1998, the OIC presented evidence relating to these allegations to officials of the Department of Justice. The next day, the Attorney General petitioned the Special Division, on an expedited basis, to expand the OIC's jurisdiction. In response to the Attorney General's request, the Special Division conferred jurisdiction on the OIC to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law . . ." Pet. App. 97a. On January 17, 1998, President Clinton was deposed in connection with the *Jones* case, and was asked a number of specific questions about his relationship with Monica Lewinsky.

From the beginning of its inquiry into this matter, the OIC has received—and continues to receive—numerous and credible reports that Secret Service personnel have

evidence relevant to the investigation. Specifically, the OIC is in possession of information that Secret Service personnel may have observed evidence of possible crimes while stationed in and around the White House complex.

2. On January 27, 1998, representatives of the OIC met with representatives of the Secret Service to discuss the issue of testimony by Secret Service employees. The Secret Service asserted that some testimony by its personnel would be covered by a "protective function privilege."

On April 10, 1998, the United States, represented by the OIC, moved to compel Secret Service witnesses to testify regarding the matters as to which they had previously invoked the proposed "protective function privilege." In an opinion and order entered May 22, 1998, Chief Judge Norma Holloway Johnson granted the motions to compel. Pet. App. 15a-27a.

Chief Judge Johnson began her analysis by describing the nature of the privilege that the Secret Service had asserted. The court observed that "[n]one of the questions at issue relate to the protective techniques or procedures of the Secret Service." Pet. App. 15a.

Turning to the decisions of this Court that govern the creation of proposed new privileges, the district court held that Fed. R. Evid. 501 and this Court's precedents require courts to consider "1) whether the asserted privilege is historically rooted in federal law; 2) whether any states have recognized the privilege; and 3) public policy interests." Pet. App. 16a-17a (citations omitted). After describing the traditional reluctance of the federal courts to create new evidentiary privileges, Chief Judge Johnson briefly summarized this Court's recent decisions regarding the subject, noting that new privileges are far more frequently rejected than recognized.

The district court next considered the history of the proposed "protective function privilege" in federal law. Recognizing that no court has ever adopted the privilege,

and finding no constitutional, statutory, or common-law basis for it, the district court proceeded to analyze the two federal statutes relevant to the issue: 18 U.S.C. § 3056(a) and 28 U.S.C. § 535(b). Section 3056(a), the court observed, requires the President and Vice President to accept the protection of the Secret Service, but does not create an evidentiary privilege for its employees. Section 535(b), in turn, imposes an affirmative duty on Executive Branch personnel to report "any information" regarding criminal activity by government officers and employees to the appropriate supervisory authority (normally, the Attorney General). The district court's analysis of this latter statute in particular led it to conclude that "a protective function privilege would contradict the goal of section 535(b), which is to have executive branch employees report criminal activity by government officials." Pet. App. 19a.

Chief Judge Johnson noted that the Secret Service has never attempted to assert the "protective function privilege" on any of the various occasions in which its employees have testified in the past. Accordingly, "the Secret Service's own history, the lack of any constitutional or statutory support for the claimed privilege, and the federal case law regarding newly asserted privileges under Rule 501 all weigh against recognizing the privilege." Pet. App. 21a.

Turning to the history of the proposed privilege in state law, Chief Judge Johnson observed that "[n]o state has ever recognized a protective function privilege or its equivalent," and that this "absence of any state support for the privilege not only militates against recognizing [it], but also distinguishes it significantly from the patient-psychotherapist privilege recognized [by the Supreme Court] in *Jaffee*." Pet. App. 21a. The fact that no state has ever adopted a "protective function privilege" for its governor, the court reasoned, indicates that the "reason and experience" that Fed. R. Evid. 501 requires for the

creation of a new privilege are lacking. Pet. App. 21a-22a.

The district court also examined the public policy justifications for the “protective function privilege” advanced by the Secret Service, including its argument that if testimony were compelled from its employees, “current and future Presidents would inevitably distance themselves from Secret Service personnel, thereby endangering the life of the Chief Executive.” Pet. App. 22a. The court acknowledged that “[t]he physical safety of the President of the United States is clearly of paramount national importance.” *Id.*

After carefully weighing the Secret Service’s policy and fact-based arguments, however, the district court rejected them. “While the concerns of the Secret Service are legitimate, the Court is not convinced that compelling Secret Service personnel to testify before a grand jury regarding evidence of a crime would place Presidents in peril.” Pet. App. 22a-23a. The basis for this conclusion was the district court’s refusal to credit “the suggestion that the possibility that agents could be compelled to testify before a grand jury will lead a President to ‘push away’ his protectors,” and its concomitant finding that “[w]hen people act within the law, they do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury.” *Id.* at 23a. Moreover, the court reasoned, it is by no means clear that a President “would push Secret Service protection away if he were acting legally or even if he were engaged in personally embarrassing acts,” because such actions “are extremely unlikely to become the subject of a grand jury investigation.” *Id.* In short, “[t]he claim of the Secret Service that ‘any Presidential action—no matter how intrinsically innocent—could later be deemed relevant to a criminal investigation’ is simply not plausible.” *Id.* (citation omitted).

Finally, the district court noted that previous published accounts of candid observations of Presidents have not

caused them to push their protectors away. Pet. App. 23a. Presidents have a “very strong interest” in protecting their own physical safety, the court found, and the Secret Service’s educational process with regard to incoming Chief Executives will continue to instruct them of “the vital importance of close proximity” and the corresponding danger of any ill-advised “pushing away.” *Id.* at 24a.

3. The court of appeals affirmed.¹ The court began “with the primary assumption that there is a general duty to give what testimony one is capable of giving.” Pet. App. 5a (citations omitted). Thus, privileges “are not lightly created nor expansively construed.” *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

The court emphasized that, under this Court’s case law, a party seeking judicial recognition of a new evidentiary privilege under Rule 501 must demonstrate “that the proposed privilege will effectively advance a public good.” Pet. App. 6a. “In other words, the Secret Service must demonstrate that recognition of the privilege in its proposed form will materially enhance presidential security by lessening any tendency of the President to ‘push away’ his protectors in situations where there is some risk to his safety.” *Id.* As to newly asserted privileges, “[e]ven in cases where the proposed privilege is designed in part to protect constitutional rights, the Supreme Court has demanded that the proponent come forward with a compelling empirical case for the necessity of the privilege.” *Id.* at 6a-7a.

The court then turned to the policy arguments for and against the asserted “protective function privilege.” Notwithstanding the Secret Service’s predictive judgments about the behavior of the President, judges “must also assure [them]selves that those conclusions rest upon solid

¹ This Office, on behalf of the United States, filed a petition for a writ of certiorari before judgment. The Court denied that petition without prejudice on June 4, 1998. *United States v. Rubin*, 118 S. Ct. 2080 (1998).

facts and a realistic appraisal of the danger rather than vague fears extrapolated beyond any foreseeable threat." Pet. App. 7a (quotation omitted). Here, the court stated, the Secret Service's argument was based upon nothing more than speculation. *Id.* at 8a.

The court of appeals noted, moreover, that two of the three former Presidents who have publicly expressed their views (Presidents Ford and Carter) have concluded that there should be no such privilege in criminal proceedings. Pet. App. 8a. The court also concluded that the President would not be inclined to push away his protectors. He is under a statutory duty to accept such protection, *see* 18 U.S.C. § 3056(a), and "the President has a profound personal interest in being well protected." Pet. App. 8a.

The D.C. Circuit went on to observe that the Secret Service's argument was "weakened" by the form of the proposed privilege. Pet. App. 9a. "An agent may not testify about the conduct of the President or anyone else unless the agent recognizes that conduct as felonious when he is witnessing it; a felony made apparent to the agent only by subsequent events . . . must remain secret." *Id.* The court explained that the proposed exception for contemporaneously recognizable felonies undermines the policies that the Secret Service has asserted and thus "strikes a strange balance between the competing goals of providing sound incentives for the President and facilitating the discovery of truth." *Id.* The court continued:

On the one hand, because the President cannot know whether an agent will realize he is witnessing the commission of a felony—which depends in part upon how much the agent knows about prior events—the President will have to discount substantially the value of the protective function privilege (and thus perhaps be tempted to distance himself from his protectors all the same). On the other hand, the exception would prohibit testimony (and thus thwart the search for truth) even in cases where the evidence,

viewed in the light of subsequent events, would supply a key element in the proof of a serious crime.

Id.

The D.C. Circuit also found it significant that the Secret Service does not require agents to sign a confidentiality agreement, which means that the Secretary cannot ensure the confidentiality of information held by former agents. "If preventing testimony is as critical to the success of its mission as the Secret Service now claims, it seem anomalous that the Service has no better mechanism in place to discourage former agents from revealing confidences or at least to alert the Secretary when testimony is about to be given." Pet. App. 10a.

The efficacy of the proposed privilege, the court found, was also "undermined" in that it was not vested in the President, whose behavior the privilege is designed to affect. The court stated that "we know of no other privilege that works that way. If the person whose conduct is to be influenced knows that the privilege might be waived by someone else, the effect of the privilege in shaping his conduct is greatly diminished if not completely eliminated." Pet. App. 10a.

Furthermore, an incumbent President's ability to control the privilege "would end when the President leaves office." Pet. App. 10a. And thus the privilege cannot serve its asserted purpose because "disclosures by Secret Service agents after the President leaves office [may] be as feared as disclosures during his incumbency." *Id.* at 11a.

The court found yet another anomaly in that "the greatest danger to the President arises when he is in public, yet the privilege presumably would have its greatest effect when he is in the White House or in private meetings." Pet. App. 11a. In addition, the court recognized that Secret Service agents had testified in the past and "disclosed observations from their protective experiences

in books, apparently without causing Presidents to distance themselves from their protectors.” *Id.*

The court also pointed to Section 535(b) of title 28, which requires that any “information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported” to the appropriate federal law enforcement official. The court found that, at a minimum, Section 535(b) “evinces a strong congressional policy that executive branch employees must report information ‘relating to violations of title 18 involving Government officers and employees.’ That policy weighs against judicial recognition of the privilege proposed here.” Pet. App. 13a.

4. The court of appeals denied a petition for rehearing and a suggestion for rehearing en banc. Pet. App. 29a. The court explained that “no judge on the court has even requested a vote on the Justice Department’s suggestion for rehearing *en banc*.” Pet. App. 36a.

The court also denied the Secret Service’s application for a stay pending the filing of a petition for a writ of certiorari. The court stated that the Secret Service “has not made a sufficient showing that irreparable harm will result unless a stay and an order are issued, and it has not made a sufficient showing that it will ultimately prevail in establishing the privilege it alleges.” Pet. App. 35a-36a. The harm asserted is “future harm, depending on a prediction about what the President will do in the absence of the privilege.” *Id.* at 36a. But the Court recognized: “If harm of the sort the Department envisions is now occurring, it therefore must be because the President does not believe the Supreme Court will sustain the privilege. Neither a stay nor an order under the All Writs Act can alter or prevent that alleged harm. Testimony today by Secret Service agents regarding past events cannot change our ruling. And such testimony cannot affect how the Supreme Court will rule.” *Id.*

ARGUMENT

The novel privilege asserted by the Secret Service has been thoroughly analyzed by the district court and by the court of appeals. All four judges to consider the privilege claim have flatly rejected it. Indeed, despite the Secret Service's forcefully worded suggestion for rehearing en banc, not a single judge on the D.C. Circuit even called for a vote. This deafening silence refutes petitioners' speculation that the panel's ruling would result in a serious risk of harm. Pet. App. 36a.

There is a good explanation for the unanimity of the federal judges who have examined the question. As a matter of law, history, and policy, the Secret Service's claim is meritless. No case, statute, regulation, rule, or agency opinion—*ever*—has concluded that there is (or even should be) a protective function privilege. And this Court has consistently refused to recognize privileges unrooted in historical or contemporary practice. That is particularly true where, as here, a federal statute affirmatively requires the disclosure of information that falls within the asserted common-law privilege. *See* 28 U.S.C. § 535(b).

What is more, the relevant policy considerations point decisively against this previously unheard-of privilege. Secret Service officers and agents are law enforcement officers sworn to enforce and uphold the law. They work for the people of the United States, who have a bedrock interest in detecting and prosecuting federal crimes, particularly crimes committed by high government officials. The speculation that Presidents might "push away" Secret Service officers and agents absent a privilege in criminal proceedings assumes that Presidents will both violate their legal obligation to accept protection and risk their own lives unnecessarily. It also rests on the discredited notion that Presidents can prevent other government officials from testifying about the President's acts and communications. *Cf. Nixon*, 418 U.S. at 683.

For those reasons, the petition should be denied.

I

At the outset, we emphasize the compelling national interest in prompt completion of this grand jury investigation. All parties agree: This criminal investigation should be concluded sooner rather than later. At this time, moreover, there is a particularized need for expedition.

The need for expedition is of greatest importance with respect to the Secret Service's stay application. As the court of appeals specifically explained, two separate reasons demonstrate why there is no basis for a stay (even if the Court determines that the legal question presented in the petition for a writ of certiorari warrants review).

First, there is no possibility of any harm, much less irreparable harm, if a stay is denied. If the point of this litigation is what the Secret Service says it is—to obtain a definitive determination that there is a “protective function privilege”—then denial of a stay causes no harm at all. Whether this Court denies or grants certiorari, the Secret Service soon will have a definitive ruling. And we have no intention of taking any action that would cause this litigation to become moot. We have not issued (and pending completion of the appellate process, will not issue) subpoenas to all of the individuals whose testimony is at stake in the motion to compel. Thus, denial of the stay will in no way cabin the ability of this Court to review the decision of the court of appeals.

Moreover, at least until this Court issues a final ruling, we will not question any officers and agents about on-duty “protective-function” observations that occur on or after this date. As a result, there could not be *any* conceivable current Presidential pushing away caused by denial of the stay—even if the petition for certiorari is granted.

Second and independently, we respectfully suggest that there is no significant possibility of reversal of the D.C.

Circuit's decision. See *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). As the D.C. Circuit stated, "the Justice Department's likelihood of success before the Supreme Court is insufficient to warrant further delay in the grand jury's investigation" and "it has not made a sufficient showing that it will ultimately prevail in establishing the privilege it alleges." Pet. App. 36a. The lack of merit is important, for "there is no good reason for allowing a stay of the judgment below if it is certain to be affirmed, even if the case is worthy of Supreme Court review because of . . . the public importance of the question presented." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 693 (1993) (emphasis added). Therefore, even if the Court determines that this issue is of sufficient public importance that it must grant plenary review, there nonetheless is no reasonable prospect of reversal and thus no basis for a stay.

For both of those two alternative and independent reasons, the Court should deny the Secret Service's application for a stay—regardless whether it grants the petition for a writ of certiorari.

II

The petition should be denied because of the need for expeditious completion of this investigation and because the privilege asserted in this case lacks any merit. Three separate sources of law contravene the privilege claim: this Court's traditional considerations under Federal Rule of Evidence 501, the statutory disclosure obligations imposed by Section 535(b) of title 28, and an assortment of compelling public policy considerations. Moreover, as the court of appeals emphasized, the Secret Service's privilege claim on its own terms is internally inconsistent and logically incoherent. For those reasons, further review is unwarranted.

As the Secret Service notes, we previously sought certiorari before judgment. We did so in order to expedite

this investigation and because we firmly believed that the Secret Service would not back down from seeking this Court's review even in the face of a decisive defeat in the court of appeals. Our fears were well-founded, for the Secret Service has persisted in championing a privilege claim that has been roundly rejected in the court of appeals. The Solicitor General, on behalf of the Secret Service, nonetheless implies that we are somehow estopped from opposing this petition because of our earlier petition for certiorari before judgment. Pet. 12. He is wrong. A denial of certiorari from this Court, coupled with *no* prospect of any further lower court litigation, *will* constitute the "final ruling" with "moral authority and public credibility" that will end this meritless privilege litigation. Cf. Pet. 13. And all we have ever sought (unlike the Solicitor General, who did not support certiorari before judgment for reasons that remain unclear) is the quickest possible *final* ruling. At this point, that means a denial of the petition.

1. Under Rule 501, privileges are "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." Under this common-law standard, "courts have historically been cautious about privileges," *Nixon*, 418 U.S. at 710 n.18, because they obstruct the search for truth and "contravene the fundamental principle that the public has a right to every [person's] evidence." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (quotation omitted). A privilege applies only where it is "necessary to achieve its purpose," *Fisher v. United States*, 425 U.S. 391, 403 (1976), and "promotes sufficiently important interests to outweigh the need for probative evidence," *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996) (quotation omitted).

This Court has emphasized the important distinction under Rule 501 between determining the scope of an existing privilege, and creating an altogether new one. See *Swidler & Berlin v. United States*, No. 97-1192, 1998 WL 333019, at *7 (June 25, 1998). This Court's privi-

lege decisions establish that the federal courts should not recognize a new privilege under Rule 501 unless it is (i) supported by important public policy considerations and (ii) either historically rooted in law or accepted by a vast majority of States. Thus, the Court has embraced only one new evidentiary privilege since the adoption of Rule 501, and has rejected numerous others. *See Jaffee*, 518 U.S. 1 (recognizing psychotherapist-patient privilege);² *University of Pennsylvania*, 493 U.S. 182 (rejecting privilege for academic peer review materials); *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) (rejecting accountant work-product privilege); *United States v. Gillock*, 445 U.S. 360 (1980) (rejecting privilege for "legislative acts" by state legislator); *Herbert v. Lando*, 441 U.S. 153 (1979) (rejecting "editorial process privilege").

The "protective function privilege" does not meet these requirements for a new federal privilege. It has never been recognized, cited, or even discussed by any legal authority. Indeed, as far as we are aware, nothing resembling the "protective function privilege" has ever been recognized in any body of law. It also is conspicuously absent from the list of privileges proposed to Congress in 1974, and upon which this Court relied in *Jaffee*, 518 U.S. at 13-14, and *Gillock*, 445 U.S. at 367-68.

In addition, the law enforcement officers who protect state governors and other officials have been called upon to testify about their protectees. *See, e.g., Mechem Aide Testifies at Impeachment Trial*, N.Y. Times, Mar. 3, 1988, at A19. The law enforcement responsibilities of those state law-enforcement bodies that are analogous to

² In recognizing a new federal psychotherapist privilege, the Court in *Jaffee* relied on the fact that "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege," reasoning that the "consensus among the States" counseled in favor of Rule 501 recognition. *Jaffee*, 518 U.S. at 12. Moreover, the privilege had been one of the nine privileges contained in the proposed Federal Rules.

the Secret Service thus provide no support to the Secret Service's claim.

In this case, as in *University of Pennsylvania* and many others, the asserted "protective function privilege" is thus unavailing because it has no "historical or statutory basis." 493 U.S. at 195. The Secret Service should turn to Congress with its policy arguments, for this Court has oft stated "[t]he balancing of conflicting interests" when the privilege lacks historical or state law support "is particularly a legislative function." *Id.* at 189.

2. Even apart from its failure to satisfy traditional Rule 501 requirements, the Secret Service's privilege claim fails for a separate reason. Section 535(b) of title 28 requires that "[a]ny information" that government officers such as Secret Service personnel possess "relating to violations of title 18 involving Government officers and employees shall be expeditiously reported" to the proper federal law enforcement official (in this case the Independent Counsel).³ The official undertaking such an investigation is to have "*complete cooperation* from the department or agency concerned." H.R. Rep. No. 83-2622 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3551, 3552.

The import of Section 535(b) is clear: The chief federal law-enforcement officer (here, within his limited jurisdiction, the Independent Counsel, *see* 28 U.S.C. § 594(a)) is to receive complete cooperation and free access to all units of the Executive Branch, unless some overriding constitutional privilege applies. A statute such as Section 535 that sets forth a right of access or disclosure precludes judicial recognition of a contrary *common-law*

³ Section 535(b) requires that the information in question be reported to the Attorney General unless "the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law." 28 U.S.C. § 535(b)(1). Here, the responsibility to perform this investigation has been assigned to the Independent Counsel under 28 U.S.C. § 594(a) and the Special Division's order of January 16, 1998.

privilege. In *University of Pennsylvania*, for example, Title VII authorized government access to information relevant to a discrimination charge. The Court rejected a peer-review privilege claim, stating that the Title VII provisions “[o]n their face . . . do not carve out any special privilege relating to peer review materials.” 493 U.S. at 191.

Similarly, in *Arthur Young*, Section 7602 of title 26 granted the IRS a right of access to an accountant’s papers. The Court rejected an accountant’s work-product claim, stating that “the very language of § 7602 reflects . . . a congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry. . . . If the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, not this Court, to make.” 465 U.S. at 816-17.

Arthur Young and *University of Pennsylvania*, when combined with Section 535’s text and history, flatly refute the Secret Service’s *common-law* privilege claims.

Even if Section 535(b) were not dispositive, it at least “evinces a strong congressional policy that executive branch employees must report information ‘relating to violations of title 18 involving Government officers and employees.’” Pet. App. 13a. As the court of appeals explained, “[t]hat policy weighs against judicial recognition of the privilege proposed here.” *Id.* Similarly, the district court found that “a protective function privilege would contradict the goal of section 535(b), which is to have executive branch employees report criminal activity by government officials.” Pet. App. 19a.

Moreover, Section 3056(a) of title 18 authorizes the Secret Service to protect the President and requires the President to accept its protection. As the district court observed, Congress mandated protection of the President but has not created a “protective function privilege,” further supporting the conclusion that Section 535(b) should be interpreted according to its terms. Pet. App. 18a.

3. Turning to policy, the Secret Service's principal argument for recognition of its privilege is that testimony by its personnel would inevitably cause a President to push away his security detail. That speculative prediction has found no adherents in the federal judiciary. Even apart from the decisive flaws in the Secret Service's argument (the lack of historical or contemporary support for the privilege and the obligation imposed by Section 535), an impressive list of compelling policy and logical reasons convincingly demonstrates that the Secret Service's speculative argument lacks merit.

First, as the court of appeals stated, Section 3056(a) *requires* that the President accept the proximity-based protection that the Secret Service is obliged to give him. Pet. App. 8a. A common-law privilege should not be created out of whole cloth on the assumption that the President otherwise would flout a statutory obligation.

Second, a President has a strong personal interest in his own life. As Chief Judge Johnson explained, therefore, it is hard to understand why a law-abiding President would push away his protectors in situations where there is a plausible fear of attack simply because of the lack of a protective function privilege. Pet. App. 24a.

Third, as the court of appeals explained, the President has ample privacy within the White House compound—the place where he is most likely to commit crimes or acts relevant to a criminal investigation or prosecution. Pet. App. 11a. And historically, the dangers to the President have increased when he is in crowd situations outside the White House. So the lack of the “protective function privilege” would not meaningfully deter the President who wished to take care to commit criminal or wrongful acts in the White House.⁴

⁴ The Secret Service's coded suggestion that Congress has mandated “unremitting intrusion into the most intimate aspects” of the President's life is wrong. Pet. 4.

Fourth, the lack of a “protective function privilege” should have no effect on the President who “act[s] within the law,” for such persons “do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury.” Pet. App. 23a. Indeed, the district court found the contrary argument “simply not plausible.” *Id.*

Fifth, numerous officers and agents have recounted what are now claimed to be “privileged” observations in widely published books. Pet. App. 11a, 23a. Yet we are not aware of, and the Secret Service has not offered, any indication that any of these published accounts has caused a President to distance himself from his protectors.

Sixth, the Secret Service does not require Secret Service personnel to sign confidentiality agreements as a condition of employment. *See* Pet. App. 9a-10a. Thus, a retired officer has no legal restriction preventing him from disclosing information, even if there were a protective function privilege. The lack of such an agreement simply exposes the contrived, tailored-for-the-occasion nature of the privilege claim that is preventing disclosure of highly relevant Secret Service testimony in this criminal investigation.

Seventh, the President controls the privilege only while he is in Office. Termination of control over the privilege after the President leaves office—but while the President is alive and subject to criminal liability—shows that the privilege cannot meet its stated goals even if it were recognized. *Cf. Swidler & Berlin*, 1998 WL 333019, at *5 (“Posthumous disclosure of such communications may be as feared as disclosure during the client’s lifetime.”). This fact “weakens the claim that the privilege in the form proposed by the Secret Service will do anything to diminish the President’s incentive to keep his protectors at a distance.” Pet. App. 10a-11a.

Eighth, two former Presidents (Ford and Carter) have stated that there should be no protective function privi-

lege in criminal proceedings. *See* Pet. App. 8a. These statements by former Presidents sharply undercut the Secret Service's argument that Presidents would push away without this asserted privilege. (Former Attorneys General Bell, Meese, Thornburgh, and Barr also filed an amicus brief in the court of appeals emphatically opposing the asserted privilege.)

Ninth, under the Secret Service's theory, observations of the President become more sacrosanct than the constitutionally protected Presidential communications and deliberations that fall within the executive privilege. Given that the presidential communications privilege was found by this Court to be "fundamental to the operation of Government," yet overridden by the need for relevant evidence in criminal proceedings, the Secret Service's proposed privilege would create an irrational asymmetry in the law. *Cf. Nixon*, 418 U.S. at 707-13.

Tenth, under the Secret Service's theory, testimony about a President who has committed a contemporaneously recognizable felony would *not* be privileged whereas testimony about observations that constitute mere *evidence* of a felony would be. But if testimony about contemporaneously recognizable felonies will not cause "pushing away," how can testimony about evidence of felonies not recognized as such (or of misdemeanors) cause pushing away? Pet. App. 9a. In the end, there is not much to say about this gerrymandered privilege except that it strikes what the court of appeals charitably called "a strange balance between the competing goals of providing sound incentives for the President and facilitating the discovery of truth." *Id.*

In sum, as to policy, the proposed privilege would have the effect of forcing sworn law enforcement officers to remain silent while in possession of evidence that could affect serious federal criminal proceedings. And it would construct a rule premised on the assumption that a President of the United States, bound by his constitutional

oath, has a legitimate interest in engaging in criminal activity without fear of disclosure by his Secret Service personnel. Thus, even apart from the dispositive legal flaws in the Secret Service's privilege, it also lacks a coherent policy rationale.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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