UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	Misc. No. 98-148 (NHJ) **UNDER SEAL**

I. Background

Pending before the Court is the motion of the Office of Independent Counsel ("OIC") to compel the testimony of Secret Service Officers Gary Byrne and Brian Henderson and Secret Service General Counsel John Kelleher. These witnesses have refused to answer questions before a grand jury about observations and communications involving Monica Lewinsky and the President.[1] Each witness asserted the "protective function privilege" and Mr. Kelleher also asserted the governmental attorney-client privilege.[2] 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

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[1] The witnesses have also refused to testify about matters that plainly fall outside of the privilege the Secret Service has defined, namely conversations with non-Secret Service agents, including a steward and a presidential speechwriter. The witnesses will be compelled to testify as to these communications.

[2] The Court will address the governmental attorney-client privilege in a later opinion.

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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 probative 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.[3] 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)

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

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.

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.[4] 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,

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[4] 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).

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 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.[5]

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, 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

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[5] 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.

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 Gary Byrne, Brian Henderson, and John Kelleher to testify regarding the matters for which they asserted the putative protective function privilege. An appropriate Order will follow.

Norma Holloway Johnson

NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

May 22, 1998