REDACTED

GRAND JURY MATERIAL REDACTED

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

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-148 (NHJ)
	)	(Under Seal)

FILED
MAY 18 1998
CLERK, U.S. DISTRICT COURT

MOTION TO COMPEL [REDACTED], [REDACTED], AND [REDACTED] TO TESTIFY

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully moves to compel [REDACTED], [REDACTED], and [REDACTED] to testify before the grand jury regarding the matters for they have asserted the so-called "protective function privilege," the attorney-client privilege, and the work product protection. In support of this motion, the United States submits the reasons and authorities contained in its Brief in Support of Motion to Compel [REDACTED], [REDACTED], and [REDACTED] to Testify.

Respectfully submitted,

KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

6

REDACTED

GRAND JURY MATERIAL REDACTED

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

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-148 (NHJ)
	)	
	)	(Under Seal)

BRIEF IN SUPPORT OF MOTION TO COMPEL [REDACTED], [REDACTED], AND [REDACTED] TO TESTIFY

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully submits this Brief in Support of the Motion to Compel [REDACTED], [REDACTED], and [REDACTED] to testify before the grand jury. 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 furtherance of that mandate, [REDACTED], [REDACTED], and [REDACTED] have been subpoenaed to testify before the grand jury regarding certain of their observations, communications, and perceptions of matters that involve Monica Lewinsky and the President. Through their attorneys, [REDACTED], [REDACTED], and [REDACTED] have responded that they do not intend to answer questions about these matters before the grand jury (or

GRAND JURY MATERIAL REDACTED

in any other forum).

As a justification for their refusals to disclose their observations, communications, and perceptions of matters involving Monica Lewinsky and the President, [REDACTED] and [REDACTED] have invoked what they describe as a "protective function privilege." As a justification for [THE WITNESS'S] refusal, [REDACTED] has asserted "protective function privilege," attorney-client privilege, and work product protection. As a matter of law, the "protective function privilege" does not exist, and, with regard to [REDACTED], the attorney-client privilege and work product protections do not apply. Accordingly, the United States respectfully submits that the Court should compel [REDACTED], [REDACTED], and [REDACTED] to testify.[1]

I. FACTUAL BACKGROUND

On January 16, 1998, at Attorney General Reno's request, the Special Division expanded the jurisdiction of this Office to include an investigation into whether Monica Lewinsky or other individuals may have suborned perjury, obstructed justice, or

[1] The present filing is necessarily broad and general because the Secret Service, the Department of Justice, and the individuals refusing to testify have thus far failed to offer any specific rationale for invocation of the putative "protective function privilege" or coherent explanation of what communications such a privilege might encompass. The burden, of course, rests on the party asserting a testimonial privilege. Bartholdi Cable Co. v. FCC, 114 F.3d 274, 280 (D.C. Cir. 1997).

GRAND JURY MATERIAL REDACTED

intimidated witnesses in connection with the Jones case. Since the beginning of this investigation, the Office of the Independent Counsel ("OIC") has received -- and continues to receive -- numerous and credible reports that employees of the Secret Service have evidence relevant to this investigation. Specifically, OIC is in possession of information that Secret Service personnel may have observed evidence of [REDACTED].

On January 27, 1998, representatives of OIC met with representatives of the Secret Service, at which meeting the Secret Service expressed the view that interviews of Secret Service personnel about their observations while in close proximity to the President would undermine a principle of confidentiality traditionally maintained within that organization. The Secret Service maintained that disclosure of these observations could potentially lead present and future Presidents to distance themselves from Secret Service personnel while engaging in illegal or embarrassing acts. 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 these concerns.

Subsequent correspondence between OIC and the Department of Justice, representing the Secret Service, led the Department formally to assert that some testimony of Secret Service personnel would be covered by a "protective function privilege."

GRAND JURY MATERIAL REDACTED

Although the Department has never explained precisely what such a privilege might cover, it has stated that, as a general matter, it believes that the "protective function privilege" applies to observations by a Secret Service agent or officer "while in proximity to the President and while performing protective-function duties." Letter from Gary G. Grindler, Deputy Assistant Attorney General, to Kenneth W. Starr, Independent Counsel, at 1-2 (Feb. 24, 1998) (the "February 24 Letter"); see also Letter from Gary G. Grindler, Deputy Assistant Attorney General, to Kenneth W. Starr, Independent Counsel, at 2 (Mar. 13, 1998) (the "March 13 Letter"). Thus the threshold inquiry for application of the proposed privilege is a two-pronged test.

When both of the proposed threshold requirements have been met, the Department appears to believe that the privilege covers the relevant agent or officer's (1) "observation[s] of conduct," (2) "overhearing of statements," and (3) observations of "the identity of individuals." March 13 Letter at 2-3; February 24 Letter at 1. According to the Department, an observation that meets the above test "does not lose its protection under the privilege solely because it is the subject of a subsequent hearsay communication within the Secret Service." February 24 Letter at 2.

Subsequent Department of Justice correspondence has asserted that "the protective function privilege is owned and controlled

GRAND JURY MATERIAL REDACTED

by the United States and, therefore, cannot be waived by individual Secret Service officers or agents." March 13 Letter at 3. The Department has also informally suggested that, "in the context of a criminal investigation or prosecution, the privilege would not bar testimony 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." February 24 Letter at 7. Finally, the Department has suggested that there could theoretically be "compelling circumstances, such as overriding national security concerns, which might pierce the protective function privilege," although in its view such "compelling circumstances" do not exist here. *Id.*

The exchange of this correspondence occurred contemporaneously with a series of negotiations in which OIC agreed to receive testimony from certain Secret Service personnel through depositions at OIC offices rather than in the presence of the grand jury.[2] OIC further agreed to refrain from posing questions "for the purpose of seeking information that reveals protective techniques or procedures of the Secret Service, including security technologies, armaments, or devices within or around the White House complex." March 13 Letter at 3. Although

[2] The United States has agreed to treat the testimony and other evidence received in these depositions as grand jury material for purposes of Fed. R. Crim. P. 6(e).

GRAND JURY MATERIAL REDACTED

the primary purpose of the deposition format was to alleviate the Secret Service's concerns about its employees being called before the grand jury, the depositions were also intended to create a record and frame the issues for future litigation regarding the claimed "protective function privilege." Id. at 2.

On March 13, 1998, OIC deposed [REDACTED]. [REDACTED] asserted the proposed "protective function privilege" [REDACTED, FOOTNOTES REDACTED].[3]

On March 13, 1998, OIC also deposed [REDACTED]. [REDACTED] asserted the proposed "protective function privilege" [REDACTED, FOOTNOTES REDACTED]

On March 23, 1998, OIC deposed [REDACTED]. [REDACTED] asserted the "protective function privilege" [REDACTED, FOOTNOTES REDACTED] [REDACTED] also asserted the attorney-client privilege and work product protection [REDACTED, FOOTNOTE REDACTED]

On [REDACTED], the United States served grand jury subpoenas for the testimony of [REDACTED], [REDACTED], and [REDACTED], with the express understanding that they will be questioned only on matters for which they have previously invoked the "protective function privilege" or, in the case of [REDACTED], the attorney-client privilege or work product protection. In conjunction with

---

[3] The United States has submitted under separate cover an ex parte factual supplement containing the portions of the depositions in which [REDACTED], [REDACTED], and [REDACTED] made the various privilege assertions that are at issue. [REDACTED]

GRAND JURY MATERIAL REDACTED

these subpoenas, the United States requested that each of [REDACTED], [REDACTED], and [REDACTED] "indicate whether the President, who is the presumptive holder of your claimed 'protective function' privilege, has himself invoked the privilege or instructed its invocation." Letter from Robert J. Bittman, Deputy Independent Counsel, to Gary G. Grindler, Deputy Assistant Attorney General, at 1 (Apr. 8, 1998).

On April 9, 1998, [REDACTED], [REDACTED], and [REDACTED] responded that they intend to invoke the "protective function privilege," attorney-client privilege, and work product protection if asked the same questions before the grand jury to which they asserted these privileges in their depositions. Letter from Gary G. Grindler, Deputy Assistant Attorney General, to Robert J. Bittman, Deputy Independent Counsel, at 1 (Apr. 9, 1998). [REDACTED], [REDACTED], and [REDACTED] also represented that the President has neither invoked the "protective function privilege" nor directed that it be invoked, and expressed their belief that their assertions of privilege are "legally sufficient." Id. The United States now seeks to compel their testimony.

II. THE CLAIMED "PROTECTIVE FUNCTION PRIVILEGE" DOES NOT EXIST.

A. No "protective function privilege" has ever been recognized in American law.

Regardless of the arguments that [REDACTED], [REDACTED], and [REDACTED] make in support of their refusals to testify before

GRAND JURY MATERIAL REDACTED

the grand jury, this Court should remain focused on a single, indisputable, dispositive point: There is no such thing as a "protective function privilege" under federal law.

To our knowledge, no judicial decision, statute, rule, regulation, or agency opinion has ever suggested that a Secret Service employee may assert a "protective function privilege" at any time, much less in response to a federal grand jury subpoena. The absence of such precedent speaks volumes about the position that the Secret Service is advancing. There are, after all, few propositions of law so dubious that no authority, anywhere, any time has even dared to suggest them. The Secret Service is urging this Court to be the first ever to hold not only that this "privilege" exists but that it may be asserted so as to prevent sworn law enforcement officers from testifying before a federal grand jury.

Moreover, this appears to be the first time the Department of Justice and the Secret Service have ever asserted that a "protective function privilege" exists, notwithstanding the fact that Secret Service agents and officers have testified in both judicial and non-judicial proceedings on numerous occasions in the past. Such testimony has included matters within the proposed "protective functions privilege," such as in the trial of John Hinckley for his attempted assassination of Ronald Reagan and in hearings before Congress about the Nixon White House's

GRAND JURY MATERIAL REDACTED

taping system. The sole distinction between those situations and the matter at bar appears to be that, in the case of Secret Service employees who have information that pertains to possible obstruction of justice in the Jones suit, the Secret Service believes that it is not in the President's best interests to permit a grand jury to have such information. That may or may not be the case, but it is clearly not a basis for creating a previously unheard-of testimonial privilege.

That the Secret Service apparently believes -- but does not know -- that testimony from its employees would endanger the President highlights another flaw in its assertions of privilege. To date, neither the Secret Service nor the Department has offered any indication that President Clinton has asked Secret Service employees to refrain from testifying, or that he feels he will have to distance himself from them if they do so. To maintain that such testimony will cause the President to distance himself from the Secret Service, one must also indulge the wild assumption that the President will risk his life in order to engage in illegal or embarrassing conduct outside the perception of his protective detail. Without knowing the President's personal views on this matter, the idea that he may be inclined to "push away" his protective circle is pure speculation. Indeed, if the testimony of [REDACTED], [REDACTED], and [REDACTED] were to exonerate the President, one might very

GRAND JURY MATERIAL REDACTED

reasonably expect the opposite -- i.e., that he would draw in his protective circle even closer.

B. The law governing evidentiary privileges does not permit this Court to create a new "protective function privilege".

The law governing the creation of new privileges is well-known to this Court. Congress created a single rule on privileges, Rule 501, when it enacted the Federal Rules of Evidence in 1975. Under Rule 501, privileges "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." Although the language of Rule 501 permits courts to add to the privileges already established under federal law, the Supreme Court has emphasized that it is "disinclined to exercise this authority expansively." University of Pennsylvania v. EEOC, 493 U.S. 182, 189 (1990); see also United States v. Nixon, 418 U.S. 683, 710 (1974) (cautioning that privileges "are not lightly created nor expansively construed"). Thus the starting point for any claim of privilege is "'the primary assumption that there is a general duty to give what testimony one is capable of giving . . . .'" Jaffee v. Redmond, 116 S. Ct. 1923, 1928 (1996) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950).

The Supreme Court has accepted only one attempt to create a new evidentiary privilege in recent years, and has rejected numerous others. See Jaffee, 116 S. Ct. 1923 (recognizing

GRAND JURY MATERIAL REDACTED

psychotherapist-patient privilege); University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) (rejecting privilege against disclosure of academic peer review materials); United States v. Arthur Young & Co., 465 U.S. 805 (1984) (rejecting accountant's work-product privilege); United States v. Gillock, 445 U.S. 360 (1980) (rejecting privilege against disclosure of "legislative acts" by state legislator; Trammel v. United States, 445 U.S. 40 (1980) (rejecting extension of spousal privilege to voluntary testimony); Herbert v. Lando, 441 U.S. 153 (1979) (rejecting "editorial process privilege" for members of the press); Couch v. United States, 409 U.S. 322 (1973) (rejecting accountant-client privilege). Collectively, the lesson of these decisions is that the Supreme Court will recognize a new privilege under Rule 501 only when (1) the privilege is historically rooted in federal law or (2) the privilege is accepted in a vast majority of States and is supported by important public policy considerations. See Jaffee, 116 S. Ct. at 1928-32; University of Pennsylvania, 493 U.S. at 194-95; Gillock, 445 U.S. at 367-68; Trammel, 445 U.S. at 47-53; Couch, 409 U.S. at 335.

The initial inquiry, then, is whether a "protective function privilege" that prevents a sworn law enforcement officer from testifying before a federal grand jury is historically rooted in American law. It plainly is not; there are no authorities whatsoever that have suggested such a privilege exists.

GRAND JURY MATERIAL REDACTED

The question of whether the "protective function privilege" has been accepted in a vast majority of states is similarly easy to answer: It most definitely has not. In the more than 200 years that the states have had to articulate such a concept, none has even so much as toyed with the notion of a testimonial privilege for Secret Service agents, U.S. marshals assigned to protect witnesses, bodyguards, bouncers, rent-a-cops, or any other type of protective agent.

The consequence of this is that the Court need not consider the public policy implications of recognizing or not recognizing a "protective function privilege," because the necessary element of recognition in a "vast majority" of States is absent. See Jaffee, 116 S. Ct. at 1930. To the extent that they apply, however, public policy considerations also weigh strongly against recognizing a "protective function privilege." Congress, the elected body whose statutory mandates are the most accurate reflection of public policy, has indicated that the public policy of the United States is this:

> 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

GRAND JURY MATERIAL REDACTED

> Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

28 U.S.C. § 535(b). Pursuant to 28 U.S.C. § 591 et seq., the Attorney General has assigned her authority to investigate the matters at issue to the Independent Counsel. Thus, as employees of the executive branch of Government, Secret Service personnel, including attorneys, have a statutory obligation to provide the Independent Counsel the information that they are currently withholding.

Moreover, this Court is fully familiar with the strong public policy in favor of a grand jury's being permitted to conduct a comprehensive inquiry into possible wrongdoing. A grand jury investigation is "not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." Branzburg v. Hayes, 408 U.S. 665, 701 (1972) (citation omitted). For that reason, the Supreme Court has said, the grand jury is entitled to a considerably broader range of evidence than either the government or a criminal defendant would be entitled to introduce at trial. United States v. R. Enterprises, Inc., 498 U.S. 292, 298 (1991). Thus "[n]owhere is the public's claim to each person's evidence stronger than in the context of a valid grand jury subpoena." In re Sealed Case, 676 F.2d 793, 806 (D.C. Cir. 1982) (footnote omitted).

GRAND JURY MATERIAL REDACTED

C. [REDACTED], [REDACTED], and [REDACTED] have refused to testify about matters that fall squarely outside the boundaries of the proposed "protective function privilege," even as they have defined them.

Finally, it should be noted that, even under the amorphous concept of "protective function privilege" articulated in the Department's correspondence with OIC, many of the matters on which [REDACTED], [REDACTED], and [REDACTED] have refused to testify fall squarely outside the proposed privilege. For example, [REDACTED, FOOTNOTES REDACTED] Thus, even if the Court elects to recognize a "protective function privilege" in precisely the form suggested by the Secret Service, it should at least compel testimony on matters that fall outside the putative privilege such as these.

III. EVEN IF THE COURT DETERMINES TO RECOGNIZE SOME FORM OF "PROTECTIVE FUNCTION PRIVILEGE," [REDACTED], [REDACTED], AND [REDACTED] SHOULD BE COMPELLED TO TESTIFY.

As discussed in detail above, it is the position of the United States that this Court should reject the Secret Service's invitation to create a new "protective function privilege." In the event that the Court disagrees, however, the United States believes that any such newly-created privilege must be subject to the balancing of interests described in United States v. Nixon, 418 U.S. 683, 703-16 (1974).

The crux of the matter is this: The Secret Service is claiming a privilege that is designed to protect the confidentiality and the safety of the President, and no one else.

GRAND JURY MATERIAL REDACTED

Under the Supreme Court's decision in Nixon, there is a "presumptive privilege" that attaches to "the confidentiality of [a President's] conversations and correspondence." Id. at 708. No other privilege attaches specifically to the President. To the extent that it exists, then, the "protective function privilege" fits most logically within the Executive privilege that attaches to the President.

As a threshold matter, Executive privilege applies only to conduct and communications made in furtherance of a President's Article II duties, not to his purely private conduct. Those matters within OIC's January 16 grant of investigative jurisdiction -- possible subornation of perjury, obstruction of justice, and intimidation of witnesses in connection with the Jones case -- are criminal activities that fall well outside the scope of the President's official duties, no matter how broadly those duties are construed. See Jones v. Clinton, 117 S. Ct. 1636 (1997). Thus the "protective function privilege," to the extent that it may be claimed or asserted to be a subset of Executive privilege, cannot be used to bar testimony that relates to illegal private acts.

Even if such a "protective function privilege" were applicable to the observations and communications at issue here, [REDACTED], [REDACTED], and [REDACTED] must be compelled to testify because their testimony is directly relevant to an

GRAND JURY MATERIAL REDACTED

ongoing grand jury investigation and this evidence, by its very nature, is not available with due diligence elsewhere. See In re Sealed Case, 121 F.3d at 754. That is, the testimony of a group of sworn law enforcement officers who may have directly witnessed evidence of criminal conduct is a uniquely credible and insightful type of evidence that, by its very nature, cannot be obtained from non-Secret Service personnel.

Notwithstanding this, if the Court deems necessary, the United States is prepared to demonstrate the importance of the testimony and its unavailability from other sources. In the absence of a valid claim of privilege, of course, such a showing is not necessary. Because of the frivolity of the assertion of the "protective function privilege" here, the United States has not discussed the basis of its need for this testimony in detail. However, the United States can readily and expeditiously demonstrate that the testimony of these individuals is important and unavailable to the grand jury from other sources, and will provide an exhaustive factual supplement to this motion if requested by the Court.[4]

In conclusion, if the Court elects to recognize the proposed "protective function privilege" as a subset of Executive

[4] Much of the relevant factual material has already been provided to the Court through its recent in camera submissions in related litigation. Such material may very well satisfy the In re Sealed Case requirement independent of the factual supplement that the United States is offering to submit.

GRAND JURY MATERIAL REDACTED

privilege, it should also recognize that the conduct at issue here pertains only to the President's private acts. Moreover, because the putative privilege is based on a general interest in confidentiality and the testimony at issue is being sought in connection with a grand jury investigation, any privilege claim must fail.

III. [REDACTED]'S ASSERTION OF ATTORNEY-CLIENT PRIVILEGE SHOULD BE REJECTED.

As noted above, [REDACTED] asserted the attorney-client privilege as a bar to [THE WITNESS'S] answering a number of questions in [THE WITNESS'S] deposition, [FOOTNOTE REDACTED] and has expressed [THE WITNESS'S] intent to continue to assert such privilege before the grand jury. Regardless of the underlying subject matter of the questions asked, these invocations are unjustified for one central reason: The Constitution, federal statutes, rules, and case law recognize no official or governmental attorney-client privilege in grand jury investigations. That is, a federal government entity or employee simply may not assert a governmental or official attorney-client privilege in response to a federal grand jury subpoena.

To our knowledge, no judicial decision, statute, rule, regulation, or agency opinion has ever authorized a department or agency of the United States to assert a governmental attorney-client privilege in response to a federal grand jury subpoena. As with [THE WITNESS'S] assertions of "protective function

GRAND JURY MATERIAL REDACTED

privilege," the absence of any such precedent is the clearest indicator that the position being advanced by [REDACTED] is meritless.

It should go without saying that a valid assertion of the attorney-client privilege requires both an attorney and a client. [REDACTED] is a bit more understandable in light of the fact that the only published case on this issue ruled squarely against the White House. See In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997).

As emphasized above, Rule 501 is the only Federal Rule of Evidence that deals directly with privileges. The Supreme Court has indicated that federal courts should be loathe to create new privileges, as they are "in derogation of the search for truth." Nixon, 418 U.S. at 710. Thus the Court has recognized new privileges, or applications thereof, only when the proposed privilege is (1) historically rooted in federal law or (2) both accepted in a vast majority of States and supported by important public policy justifications. See Jaffee, 116 S. Ct. at 1928-32; University of Pennsylvania, 493 U.S. at 194-95; Gillock, 445 U.S. at 367-68; Trammel, 445 U.S. at 47-53; Couch, 409 U.S. at 335.

The assertion of governmental attorney-client privilege against a grand jury is not historically rooted. See, e.g., 24 C. Wright & K. Graham, Federal Practice and Procedure § 5475 (1986) ("It is far from clear that the common-law attorney-client

GRAND JURY MATERIAL REDACTED

privilege could be claimed by governments; the case law is skimpy."). [REDACTED] is asking this Court to be the first court ever to hold that, as a matter of federal common law, the attorney-client privilege allows a federal government employee to refuse to testify to a federal grand jury. [REDACTED] and [THE WITNESS'S] presumptive clients the Secret Service and the White House take this position despite its having been rejected by the Eighth Circuit only last year in the context of a grand jury subpoena for White House lawyers' notes. See Grand Jury Subpoena Duces Tecum, 112 F.3d at 925-26.

Not only is this application of the attorney-client privilege not historically rooted, but the States do not uniformly recognize it. To the contrary, although some States have codified a governmental attorney-client privilege that has been applied in civil proceedings against private parties, we are not aware of any contemporary legislation or case approving the assertion of a governmental attorney-client privilege against the government in a criminal proceeding -- much less the degree of State consensus that the Supreme Court has found necessary to recognize a privilege (or application thereof) that is not historically rooted.

To the extent they apply, public policy considerations counsel against recognizing such a privilege as well. Government employees, like [REDACTED], work for the people of the United

GRAND JURY MATERIAL REDACTED

States. That fact is of critical importance to his obligations. [REDACTED] is not engaged in the private practice of law when he advises the Secret Service or the White House. Indeed, as stressed above, 28 U.S.C. § 535(b) expressly requires [THE WITNESS] to disclose "[a]ny information, allegation, or complaint" that [THE WITNESS] has received in relation to a violation of title 18 involving Government officers or employees. This statutory requirement stands in stark contrast to [REDACTED]'s assertion of a governmental attorney-client privilege in support of [THE WITNESS'S] refusal to provide relevant information to the grand jury.

Because the application of a governmental attorney-client privilege is not historically rooted, is not supported by a consensus of States, and is not supported by sound policy justifications, [REDACTED]'s attempts to hinder the grand jury from learning the information [THE WITNESS] has regarding matters relevant to its investigation should be rejected.

V. [REDACTED]'S ASSERTION OF WORK PRODUCT PROTECTION SHOULD BE REJECTED.

Finally, [REDACTED] has asserted, in addition to claims of "protective function" and attorney-client privilege, that answering questions on [REDACTED] would run afoul of the work product doctrine.[FOOTNOTE REDACTED] Like [THE WITNESS'S] other claims, this argument should be rejected.

Technically speaking, the work product protection is not a

GRAND JURY MATERIAL REDACTED

privilege, see Fed. R. Civ. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947), but is a qualified protection afforded by rule in civil proceedings to protect the functioning of the adversary process. It protects work that an attorney does in preparing for litigation, and encompasses interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and tangible items. While this protection does apply to grand jury proceedings, it can be overcome depending on the nature of the information sought and the need of the requesting party.

A basic requirement of the work product doctrine is that it applies to documents created by and certain statements made by an attorney in anticipation of litigation, not to every document or conversation that bears some tenuous connection to an attorney-client relationship. Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. RTC, 5 F.3d 1508, 1515 (D.C. Cir. 1993). Here, [REDACTED]'s clients -- presumably the Secret Service and the White House -- are not capable of becoming either criminal defendants or parties to any related litigation.[5] Therefore, [REDACTED]'s work simply was not performed in anticipation of litigation in which [THE WITNESS'S] clients might be parties. See In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 924 (rejecting common interest argument and concluding that White

[5] Indeed, when asked in [THE WITNESS'S] deposition, [REDACTED] was unable to identify the litigation that [THE WITNESS] implicitly claims was being anticipated. [REDACTED].

GRAND JURY MATERIAL REDACTED

House lawyers could not act in anticipation of litigation).

[REDACTED]'s assertions of work product protection as a basis for refusing to answer questions before the grand jury are patently invalid. [THE WITNESS] should be compelled to testify.

V. CONCLUSION.

The assertions of "protective function privilege," attorney-client privilege, and work product protection by [REDACTED], [REDACTED], and [REDACTED] are improper. They should be ordered to appear before the grand jury and respond to questions about their observations, communications, and perceptions of matters relevant to possible subornation of perjury, obstruction of justice, and intimidation of witnesses in the Jones v. Clinton lawsuit.

Respectfully submitted,

KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688