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Evidence: The Clinton Administration's Battle to Gain Evidentiary Privilege for Secret Service Agents--Another Tainted Legacy?

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EVIDENCE: THE CLINTON ADMINISTRATION'S BATTLE TO GAIN EVIDENTIARY PRIVILEGE FOR SECRET SERVICE AGENTS—ANOTHER TAINTED LEGACY?

In re Sealed Case, 148 F.3d 1073 (D.C. Cir.), *cert. denied*, Rubin v. United States 119 S. Ct. 461 (1998)

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Appellant, Secretary of the Treasury, asserted a protective function privilege on behalf of officers of the United States Secret Service to prevent their testimony in a federal grand jury proceeding.[1] The privilege, as described by the Secret Service, would have protected information obtained by Secret Service officers while performing their protective function in physical proximity to the President of the United States.[2] Appellee, Office of the Independent Counsel (OIC),[3] filed a motion in the United States District Court for the District of Columbia to compel their testimony.[4] The district court granted the OIC's motion to compel and dismissed the Secretary's novel claim, holding that there was no basis in the Constitution or in U.S. legal history for recognizing the asserted privilege.[5] The Secretary of the Treasury appealed and the United States

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* I would like to dedicate this Case Comment to my parents, Tim and Lucy Crowley.

1. *See In re* Sealed Case, 148 F.3d 1073, 1074 (D.C. Cir.), *cert. denied*, Rubin v. United States, 119 S. Ct. 461 (1998).

2. *See id.* at 1075. The proposed privilege would have absolutely protected "'information obtained by Secret Service personnel while performing their protective function in physical proximity to the President.'" *Id.* The privilege would not apply "'in the context of a federal investigation or prosecution, to bar testimony by an officer or agent concerning observations or statements that, at the time they were made, were sufficient to provide reasonable grounds for believing that a felony has been, is being, or will be committed.'" *Id.*

3. 28 U.S.C.A. § 594(a) gives the Office of the Independent Counsel authority to exercise the investigative and prosecutorial functions of the Attorney General. *See* 28 U.S.C.A. § 594(a) (West 1998). 28 U.S.C.A. § 535 authorizes the Attorney General, and thus the Office of the Independent Counsel, to investigate crimes involving government officers and employees, including the President of the United States. *See* 28 U.S.C.A. § 535 (West 1998).

4. *See In re* Grand Jury Proceedings, No 98-148, 1998 WL 272884, at *1 (D.D.C. May 22, 1998), *aff'd by* 148 F.3d 1073 (D.C. Cir. 1998).

5. *See id.* at *2. The court held that there was "no constitutional basis for recognizing a protective function privilege. In addition there is no history of the privilege in federal common or statutory law." *Id.* at *3. With respect to state law, the court noted that "[n]o state has ever recognized a protective function privilege or its equivalent." *Id.* The court concluded by stating that "[e]ven 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.*" *Id.* at *4 n.3. (emphasis added).

Court of Appeals, District of Columbia Circuit granted review.[6] In affirming the decision of the trial court, the D.C. Circuit Court of Appeals HELD, inter alia,[7] that the claimed privilege would not be recognized and did not protect officers from being compelled to testify.[8]

The Secret Service's claim of a protective function privilege for its officers finds no support in the U.S. Constitution and has never been recognized at common law or by statute.[9] Rule 501 of the Federal Rules of Evidence provides the foundation for claims of evidentiary privilege not previously recognized and is therefore controlling in the instant case.[10] That rule provides in pertinent part, 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."[11]

The history of Rule 501 indicates Congress' intention to leave the continued development of evidentiary privilege to the courts.[12] In 1973, the Supreme Court forwarded to Congress the Proposed Federal Rules of Evidence drafted by its Judicial Advisory Committee.[13] This initial proposal contained nine separate rules which specifically articulated each instance in which an evidentiary privilege would be recognized.[14]

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6. *See Sealed Case*, 148 F.3d at 1075. The Court of Appeals claimed jurisdiction under 28 U.S.C.A. § 1291. *See id.* Because the recognition of a testimonial privilege is a legal issue, the court's review was de novo. *See id.*

7. *See id.* at 1074. The court also held that the Secretary of the Treasury could pursue an immediate appeal from the district court's order compelling Secret Service agents' testimony. *See id.*

8. *See id.* at 1079.

9. *See supra* note 5.

10. *See* FED. R. EVID. 501.

11. *Id.* Rule 501 provides in full:

> 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.

Id.

12. *See generally* United States v. Gillock, 445 U.S. 360, 367-68 (1980) (giving a brief history of the development of Rule 501).

13. *See id.* at 367.

14. *See* Proposed Federal Rules of Evidence 501-513, H.R. DOC. No. 93-46, pp. 9-19 (1973). These Rules defined nine non-constitutional privileges which the courts were obliged to recognize: required reports; lawyer-client; psychotherapist-patient; husband-wife; communications to clergy;

However, controversy regarding the scope of the nine privileges arose during the hearings on the Proposed Rules.[15] As a result of this controversy, Congress substantially revised the Proposed Rules by deleting the nine separate privileges and creating a single rule for all evidentiary privileges.[16]

In essence, the revised version of the Rules[17] exhibited Congress' intent to refrain from freezing the law of privilege "at a particular point in . . . history"[18] and allowed the federal courts to "'continue the evolutionary development of testimonial privileges'" in federal criminal trials.[19] In spite of this expansive power, the federal courts have been reluctant to create or recognize evidentiary privileges.[20] The Supreme Court has consistently reiterated that the integrity of the judicial system depends upon full disclosure of all relevant facts.[21] Evidentiary privileges however, frustrate this basic principle of the criminal justice system.[22] Thus, the federal courts generally recognize an evidentiary privilege only if the Constitution,[23] the federal common law[24] or a majority of the states[25] support recognition of

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political vote; trade secrets; secrets of state and other official information; and identity of informer. *See id.*

15. The controversy focused primarily on the scope of the rules and the propriety of any privileges being promulgated under the Rules Enabling Act, given their arguably substantive effect. *See id.* Additionally, there was particular concern about the omission of both the physician-patient privilege and the marital communications privilege and the inclusion of what some considered to be an overly broad privilege for state secrets. *See id.* A final concern surrounded the fact that the rules as promulgated would have applied to all actions in federal courts, overriding state privilege law, even where state law supplied the rule of decision. *See id.*

16. *See Gillock*, 445 U.S. at 367.

17. *See id.* Rule 501 replaced Proposed Federal Rules of Evidence 501-513. *See id.*

18. Jaffee v. Redmond, 518 U.S. 1, 9 (1996).

19. *Id.* (quoting Trammel v. United States, 445 U.S. 40, 47 (1980)).

20. *See generally* University of Pennsylvania v. EEOC, 493 U.S. 182, 189 (1990) (rejecting academic peer review privilege); United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984) (rejecting work product immunity for accountants); *Gillock*, 445 U.S. at 373 (rejecting speech-or-debate privilege for state legislators); *Trammel*, 445 U.S. at 51-53 (rejecting privilege against adverse spousal testimony, but continuing to recognize privilege for confidential marriage communications); United States v. Nixon, 418 U.S. 683, 705-13 (1974) (rejecting the President's requests for general confidentiality, but recognizing a qualified executive privilege); Couch v. United States, 409 U.S. 322, 335 (1973) (rejecting accountant-client privilege); Branzburg v. Hayes, 408 U.S. 665, 690-91 (1972) (rejecting news reporter's privilege).

21. *See Nixon*, 418 U.S. at 710.

22. *See id.* The Court in *Nixon* stated that "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.*

23. *See* U.S. CONST. art. V.

24. *See* Swidler & Berlin v. United States, 118 S. Ct. 2081, 2084 (1998). The Court noted that "the attorney client privilege is one of the oldest recognized privileges for confidential communications." *Id.* (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); *see also Trammel*, 445 U.S. at 51-53. The Court stated that "the long history of the privilege [against

a privilege.

Branzburg v. Hayes[26] was one of the first cases to illustrate the judiciary's reluctance towards creating evidentiary privileges.[27] In *Branzburg*, the Supreme Court considered whether to extend a privilege to reporters who refused to disclose their confidential sources.[28] The petitioners in *Branzburg*[29] argued that, if forced to testify against their confidential sources, the chilling effect on reporting would violate their First Amendment freedom of press rights.[30] The petitioners, therefore, claimed that a reporter's compelled testimony was constitutionally suspect and that the Court was required to recognize a "reporter's privilege."[31]

In dismissing the petitioners' position, the Court recognized that the burden on reporting would be notable.[32] However, the Court declined to hold that this effect was sufficient to outweigh the significant public interest in ensuring effective grand jury proceedings.[33] The Court reasoned that neither the federal common law nor any federal statute provided support for the reporter's privilege.[34] Further, the Court stated that only a minority of the states had chosen to recognize the reporter's privilege.[35] This lack of precedent convinced the Court to reject the petitioners'

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adverse spousal testimony in federal courts] suggests that it ought not to be casually set cast aside." *Id.*

25. *See Jaffee*, 518 U.S. at 12 (commenting that State support usually comes from State legislation or State case law); *see also infra* note 55.

26. 408 U.S. 665 (1992).

27. *See id.* at 690-91.

28. *See id.* at 667-79.

29. *See id.* The *Branzburg* case actually involved two different petitioners, Branzburg and Pappas. *See id.* Certiorari was granted to resolve conflict between *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970) (upholding the refusal of a reporter to appear and testify before a grand jury with respect to confidential sources) and *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970). The court also granted certiorari to Petitioner Pappas's case, *see In re* Pappas, 266 N.E.2d 297 (Mass. 1971) (rejecting claimed right of reporters to refuse to testify before grand juries with respect to confidential sources). *See Jaffee*, 518 U.S. at 667-75.

30. *See Jaffee*, 518 U.S. at 679-82. Simply put, the petitioners asserted that an essential part of reporting involves agreements to keep their sources of news confidential. *See id.* at 680. If the reporter is nevertheless forced to reveal these confidences to a grand jury, the confidential sources of all other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. *See id.*

31. *Id.* at 682.

32. *See id.* at 690-91. The Court held that "[o]n the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering." *Id.* at 690.

33. *See id.* at 686-88. "[T]he grand jury's authority to subpoena witnesses is not only historic . . . but essential to its task." *Id.* at 688 (citations omitted).

34. *See id.* at 685-89.

35. *See id.*

arguments despite the privilege's design to protect constitutional rights.[36] Valid policy arguments supporting the privilege could not offset the want of constitutional, statutory or common law precedent for the privilege.[37]

Two years later, in *United States v. Nixon*,[38] the Supreme Court addressed the issue of evidentiary privilege in the context of the Presidency.[39] In *Nixon*, the President challenged a subpoena which directed him to produce tape recordings and documents of his prior conversations with Presidential staff members.[40] The President claimed the subpoena would force him to disclose confidential communications protected by an evidentiary privilege.[41] The district court was not receptive to his argument and denied his motion to quash the subpoena.[42] The Supreme Court affirmed the trial court's ruling[43] and held that a President's generalized interest in confidentiality was subsumed by a prosecutor's demonstrated, specific need for evidence in a criminal investigation.[44]

The *Nixon* Court focused much of its analysis on the dangers of recognizing evidentiary privileges in a criminal justice system which relies upon its citizens for full disclosure of all relevant facts.[45] The Court emphasized that evidentiary privileges should be recognized only in exceptional circumstances[46] since exclusion of evidence frustrates the most basic principles of the criminal justice system.[47] *Nixon* thus stood for the proposition that any evidentiary privilege runs contrary to the criminal justice system and has the potential to gravely impair the basic function of the courts.[48] Therefore, the Court believed that it was essential to limit

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36. *See id.* at 690.

37. *See id.* at 686-88.

38. 418 U.S. 683 (1974).

39. *See id.* at 686.

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.* at 686-87. The case never went before the Court of Appeals. *See id.* The Supreme Court granted both the United States' petition for certiorari before judgement and the President's cross petition for certiorari before judgment because of the public importance of the issues presented and their need for prompt resolution. *See id.*

44. *See id.* at 713.

45. *See id.* at 709 ("[T]he ends of criminal justice would be defeated if judgements were to be founded on a partial or speculative presentation of the facts.").

46. *See id.* The court noted that certain constitutional, statutory, and common law privileges exist to protect important societal interests which are in conflict with one another. *See id.* (quoting Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (quoting United States v. Bryan, 339 U.S. 323, 331 (1949); Blackmer v. United States, 284 U.S. 421, 438 (1932))). The Court listed the Fifth Amendment prohibition against self-incrimination and the attorney client privilege as examples. *See id.*

47. *See id.* ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts.").

48. *See id.*

evidentiary privileges to those instances where the Constitution, statutes or common law has determined that the exclusion of relevant evidence has a public benefit outweighing the benefits of maintaining the integrity of the criminal justice system.[49]

The high standard for recognizing evidentiary privileges established by the Court's decisions in *Nixon* and *Branzburg*[50] remained intact until 1996 when the Court decided *Jaffee v. Redmond*.[51] In *Jaffee*, the Supreme Court recognized an evidentiary privilege protecting the psychotherapist-patient relationship.[52] While employing essentially the same analysis as in *Nixon* and *Branzburg*, the Court reasoned that the attendant circumstances in *Jaffee* were sufficiently persuasive to overcome the significant public interest in maintaining the integrity of the criminal justice system.[53] The Court's decision was primarily based upon the fact that all fifty States and the District of Columbia had recognized some form of psychotherapist-patient privilege.[54] Additionally, the Court noted that the psychotherapist-patient privilege was among the nine specific privileges that the Judicial Advisory Committee recommended to Congress as part of the Proposed Federal Rules of Evidence in 1973.[55] These two significant factors were reinforced by the public interest supporting recognition of the privilege[56] and ultimately justified the creation of the psychotherapist-patient privilege.[57]

Jaffee provided that the federal courts would consider the history of a privilege as well as the policy decisions of the states when determining whether a privilege should be created or modified.[58] However, the Court did not assert that a compelling public interest could meet the standard required for creation of an evidentiary privilege.[59] The Court merely

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49. *See id.* at 710 n.18. (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

50. *See id.* at 709-10; *Branzburg*, 408 U.S. at 708.

51. 518 U.S. 1 (1996).

52. *See id.* at 18.

53. *See id.* at 15.

54. *See id.* at 12 n.11 ("That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege.").

55. *See id.* at 10.

56. *See id.* at 11 ("The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.").

57. *See id.* at 22-23. In a powerful dissent, Justice Scalia accused the Court of giving too little consideration to the scope of the privilege. *See id.* at 20 (Scalia, J., dissenting). He argued that the Court should have analyzed its decision to allow the privilege to extend to licensed social workers much more carefully. *See id.* (Scalia, J., dissenting).

58. *See id.* at 12-13; *see also* United States v. Gillock, 445 U.S. 360, 368, n.8 (1980); Trammel v. United States, 445 U.S. 40, 48-50 (1979).

59. *See Jaffee*, 518 U.S. at 12-13.

provided that policy arguments may reinforce a claim of evidentiary privilege once some evidence of constitutional, statutory or common law precedent has been proven.[60]

In the instant case, the D.C. Circuit affirmed the decision of the district court and declined to recognize an evidentiary privilege based on the protective function of Secret Service officers in relation to the President.[61] In so holding, the instant court noted the lack of state and federal precedent for the protective function privilege. Yet contrary to the Supreme Court's prior analyses,[62] the instant court held that the absence of this precedence did not prevent recognition of the privilege.[63] Instead, the instant court held that the relevant inquiry was whether the Secret Service had proven, by clear and convincing evidence, that the proposed privilege was essential to the preservation and enhancement of the President's safety.[64] The Secret Service contended that the public interest in ensuring the safety of the President was sufficient to overcome the President's duty to testify.[65] Moreover, they argued that rejection of the asserted privilege would cause the President to distance himself from his protectors and possibly threaten his future safety.[66] Ultimately, the instant court rejected the Secret Service's reasoning and concluded that their arguments were too speculative[67] to overcome the heavy burden weighing against recognition of the privilege.[68]

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60. *See id.*

61. *See In re* Sealed Case, 148 F.3d 1073, 1076 (D.C. Cir.), *cert. denied*, Rubin v. United States, 119 S. Ct. 461 (1998).

62. *See Jaffee*, 518 U.S. at 12; Branzburg v. Hayes, 408 U.S. 665, 686-88 (1972).

63. *See Sealed Case*, 148 F.3d at 1076 ("[W]e do not regard the absence of precedent as weighing heavily against recognition of the privilege."). *See also* Rubin v. United States, 119 S. Ct. 461 (1998) (Breyer, J., dissenting) (noting his approval of the instant court's finding that the lack of precedence should not be determinative of whether a privilege is recognized), *denying cert. to* 148 F.3d 1073 (D.C. Cir. 1998).

64. *See Sealed Case*, 148 F.3d at 1076. ("[J]udicial recognition of the privilege depends entirely upon the Secret Service's ability to establish clearly and convincingly both the need for and the efficacy of the proposed privilege.").

65. *See id.* at 1075.

66. *See id.*

67. *See id.* at 1076 (noting that the arguments of the Secret Service were "based in large part on speculation—thoughtful speculation, but speculation nonetheless") (quoting Swidler & Berlin v. United States, 118 S. Ct. 2081, 2088 (1998)); *see also Branzburg*, 408 U.S. at 693-94 (stating that "[e]stimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a large extent speculative").

68. The arguments which the Supreme Court hears to support claims for evidentiary privilege are quite varied. *Compare Sealed Case*, 148 F.3d at 1076 (rejecting as speculative the Secret Service's arguments that denying a protective function privilege for the President will cause him to distance himself from his security), *and Branzburg*, 408 U.S. at 693-94 (rejecting as speculative and widely divergent arguments which assert that issuing subpoenas to confidential informants will have an inhibiting effect on the informant's future willingness to divulge information to newsmen),

The D.C. Circuit's rejection of the claimed privilege reiterates the judiciary's unwillingness to recognize evidentiary privileges.[69] Despite this demonstrated reluctance the instant court failed to explicitly set forth its standard for determining whether a claimed privilege will be recognized.[70] In asserting that a compelling public interest was sufficient to create an evidentiary privilege, the instant court diverged from the Supreme Court's prior standard which required something more than a compelling public interest.[71]

The instant court held that the President's physical safety amounts to the kind of transcendent public good that, in principle, might justify the recognition of a new privilege.[72] Yet, in the end, the Secret Service's persuasive arguments in favor of the privilege were not sufficient to demonstrate both the need for and the efficacy of the proposed privilege.[73] The instant court stated that any tendency of the President to distance himself from his protectors would be balanced by the President's correlative duty to accept protection and the President's own profound personal interest in being well protected.[74] Even if the asserted privilege was recognized, the instant court noted that the privilege would not provide an enhanced level of protection because of its awkward operation.[75] In fact, the instant court systematically rejected each of the Secret Service's arguments in a manner which indicates that no public interest could ever satisfy this lofty standard.[76] Despite the court's apparent relaxation of the standard, the instant court reviewed the Secret Service's claim of privilege with the same scrutiny that each of the prior claims of privilege has faced.[77]

Regardless of its conclusion, the instant court's analysis remains unsettling because it departs from the weight of authority which stressed the importance of precedent in determining whether a privilege will be recognized.[78] No case recognizing an evidentiary privilege has relied entirely on a policy argument for support.[79] In fact, the presence or absence

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with Jaffee, 518 U.S. at 11-12 (upholding a psychotherapist privilege because it "serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem").

69. *See Sealed Case*, 148 F.3d at 1078-79.

70. *See id.* The court described a specific standard which would satisfy the facts of the instant case but failed to offer a general standard for other cases. *See id.*

71. *See supra* note 5.

72. *See Sealed Case*, 148 F.3d at 1076.

73. *See id.* at 1076-78.

74. *See id.* at 1077.

75. *See id.*

76. *See id.* at 1076-78.

77. *See id.*

78. *See supra* notes 24 & 54.

79. *See* Swidler & Berlin v. United States, 118 S. Ct. 2081, 2084 (1998) (recognizing the

of constitutional, statutory, or common law precedence is controlling in the majority of the cases, while policy arguments tend only to reinforce claims of evidentiary privilege.[80] Even in *Jaffee*, a case often cited for its reliance on policy arguments to create an evidentiary privilege, the existence of widespread state support for the psychotherapist-patient privilege ultimately convinced the Court to recognize that privilege.[81] In his dissent, Justice Scalia emphatically criticized the policy arguments in that case as insufficient to justify the occasional injustice which would arise in federal courts as a result of the recognized privilege.[82]

A standard that allows policy arguments alone to compel recognition of an evidentiary privilege stands in stark contrast to the *Nixon* Court's analysis as well.[83] According to the *Nixon* Court, the instant court's standard would significantly frustrate the goals of the criminal justice system by allowing an excessive number of evidentiary privileges in federal criminal proceedings.[84] The new standard would open the door to claims of privilege whenever a contemporary policy argument captured the public's interest.[85] Such a standard would extend beyond the contemplation of the *Nixon* Court.[86]

Thus, in contrast to the great weight of authority, the instant court's broad deviation from the common law departs from the reason and experience which has kept this area of the law consistent over the past twenty years.[87] Even after considering the court's decision in the context of contemporary policies and politics, the instant court's reasoning for adopting this inconsistent standard is not readily apparent. Whatever the

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attorney client privilege as one of the oldest privileges for confidential communications); *Jaffee*, 518 U.S. at 12 (recognizing that the psychotherapist-patient privilege was supported by all fifty states, the District of Columbia and the legislative history of the Proposed Federal Rules of Evidence); Trammel v. United States, 445 U.S. 40, 51-53 (1979) (recognizing that the privilege against adverse spousal testimony has ancient roots and that it should not be casually cast aside).

80. *See supra* note 79.

81. *See supra* note 54.

82. *See Jaffee*, 518 U.S. at 22 (Scalia, J., dissenting). Justice Scalia recognized that psychotherapy undoubtedly is beneficial to individuals with mental problems, and that it surely serves some larger social interest by contributing to the maintenance of a mentally stable society. *See id.* (Scalia, J., dissenting). In his mind however, the court failed to consider the most important questions in their inquiry. *See id.* Were these values "of such importance, and is the contribution of psychotherapy to them so distinctive, and is the application of normal evidentiary rules so destructive to psychotherapy, as to justify making our federal courts occasional instruments of injustice?" *Id.* (Scalia, J., dissenting).

83. *See Nixon*, 418 U.S. at 708-10.

84. *See id.*

85. *See id.*

86. *See id.*

87. *See In re* Sealed Case, 148 F.3d 1073, 1076-78 (D.C. Cir.), *cert. denied*, Rubin v. United States, 119 S. Ct. 461 (1998).

instant court's reasoning, the continued validity of a standard which discounts the value of precedence and instead turns to policy arguments for primary support is quite unsettled.

The creation of an evidentiary privilege by the judiciary is indeed a rare occurrence. The instant court's denial of a protective function privilege for officers of the Secret Service illustrates the reluctance which courts have traditionally exhibited when confronted with a claim of evidentiary privilege. However, the instant court's bold statement that policy arguments, by themselves, may be sufficient to support a claim of evidentiary privilege is simply untenable when considered against the great weight of authority. In each case recognizing a privilege there has been at least some principal support from constitutional, common law, or statutory sources. In the absence of such support, no policy argument will overcome the lofty standard which the federal courts have created for the recognition of an evidentiary privilege.

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