REDACTED
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

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

BRIEF FOR THE RESPONDENTS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Secretary of the Treasury correctly asserted a protective function privilege in response to grand jury subpoenas for the testimony of Secret Service officers concerning information they learned while in proximity to the President of the United States for the purpose of protecting him.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1942

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND LEWIS C. MERLETTI, DIRECTOR OF THE UNITED STATES SECRET SERVICE[1]

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

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The memorandum opinion and order of the district court (Pet. App. 1A-11A) is not yet reported. Portions of the opinion and the record remain under seal.

---

[1] Petitioner names Secretary Rubin and Director Merletti as the respondents, both in the caption and in the parties to the proceeding (Pet. iii), and makes no mention of the United States as holder of the privilege. [REDACTED.] (Hereinafter, all references to "Pet. App." are to the unredacted appendix to the petition for a writ of certiorari before judgment that was filed under seal.) [REDACTED.] To avoid unnecessary debate on such issues, however, we shall, for the Court's convenience only, refer to the "respondents" as petitioner has seen fit to identify them.

JURISDICTION

The district court entered its order on May 22, 1998. [REDACTED.] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

Petitioner, through the Independent Counsel, moved the United States District Court for the District of Columbia to compel Secret Service personnel to testify before a grand jury about information that they, or other Secret Service personnel, learned while protecting the President of the United States. The Secretary of the Treasury, on behalf of the United States, formally asserted the protective function privilege. Supported by affidavits under seal, the Secretary represented that, if the courts refuse to recognize the privilege, it would damage the Secret Service's confidential relationship with the President and seriously impair the Service's ability to protect the physical safety of the President. The district court refused to recognize the protective function privilege and granted petitioner's motion to compel. [REDACTED] and petitioner filed this petition for writ of certiorari before judgment in the court of appeals on June 2, 1998.

1. The Special Division of the United States Court of Appeals for the District of Columbia Circuit has conferred jurisdiction on the Independent Counsel to investigate "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. 40A-41A (Order, Division No. 94-1 (filed Jan. 16, 1998)).

In the course of that investigation, petitioner has sought documents from the Secret Service, which has cooperated with petitioner and provided all requested, non-privileged information. Petitioner also has conducted depositions of Secret Service personnel, including several Secret Service officers whose duties involve protecting the life of the President of the United States. Those persons declined, under a claim of privilege, to disclose information that they or other Secret Service personnel learned while in proximity to, and in the course of protecting, the President. In response, petitioner filed a motion to compel their testimony before the grand jury. The Department of Justice, on behalf of the United States, opposed that motion. The Secretary of the Treasury submitted a formal declaration on behalf of the United States asserting the protective function privilege against disclosure of the requested testimony. Pet. App. 1A, 9A; Declaration of Robert E. Rubin 1-2. The Attorney General likewise determined that the interest in protecting the safety of the President called for the privilege to be asserted. Opposition to the Independent Counsel's Motion to Compel, at 32.

The Director of the Secret Service submitted a separate declaration describing the need for the privilege. See Pet. App. 14A-39A (Declaration of Lewis C. Merletti). The Director explained, with supporting exhibits, that the Service protects the President from assassins by placing agents near him at all times. The agents' close proximity cannot be maintained without a relationship of absolute trust and confidence. See *id.* at 16A-22A, 26A-33A (¶¶ 4-13, 18-25). The Director concluded, based on his responsibilities

as Director and his extensive first-hand experience in protecting three Presidents (*id.* at 17A (¶ 5)), that compelling Secret Service personnel to disclose information learned in the course of protecting the President would breach that relationship, thereby causing the President to distance himself from the agents. The result would be to impair the Service's future ability to protect the President—and the Nation—from the risk of a presidential assassination. See *id.* at 17A, 33A-38A (¶¶ 5, 26-30).

The Director explained that his judgment is borne out by the Nation's tragic experience with presidential assassination attempts. As the Warren Commission noted, "[a]ttempts have * * * been made on the lives of one of every five American Presidents. One of every nine Presidents has been killed." *Report of the President's Commission on the Assassination of President John F. Kennedy* 504 (1964). Since 1964, Presidents Ford, Reagan, and Clinton were the targets of domestic assassination attempts, and President Bush was the target of a foreign assassination attempt. The Director described how the proximity of Secret Service agents played a decisive role in protecting President Reagan and how greater proximity might have prevented the deaths of Presidents McKinley and Kennedy. Pet. App. 19A-21A (¶¶ 10-12).

The Director's supporting exhibits included an unsolicited letter from former President George Bush. President Bush stated that "[w]hat's at stake here is the protection of the life of the President" and "the confidence and trust that a President must have in the [Secret Service]." Merletti Declaration, Exh. H, at 1. He continued that, as a former occupant of the White House, "had I felt that [Secret Service person-

nel] 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." *Ibid.* President Bush then reiterated that "[w]hat's at stake here is the confidence of the President in the discretion of the [Secret Service]," and concluded that "[i]f that confidence evaporates the agents, denied proximity, cannot properly protect the President." *Id.* at 2.[2]

3. The district court refused to recognize the protective function privilege and therefore granted petitioner's motion to compel. Pet. App. 1A-11A. Citing this Court's decision in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), the district court acknowledged that Rule 501 of the Federal Rules of Evidence provides that the privilege of a witness or government "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." See Pet. App. 2A. The court nevertheless refused to allow the Secret Service to invoke its protective function as a basis for privilege, relying on three grounds. First, the court observed that neither Congress nor the federal courts had heretofore recognized such a right. *Id.* at 3A-6A. Second, the court noted that the States had not created an analogous privilege for state officials. *Id.* at 6A-7A. Third, the court concluded—contrary to the professional judgment of the Secret Service and the considered opinion of a former President—that breaches of the traditional confiden-

---

[2] The assertion of the privilege was also supported by the declarations of two former Directors of the Secret Service. Opposition to the Independent Counsel's Motion to Compel, Exhs. 3-4.

tial relationship would not "lead a President to 'push away' his protectors" (*id.* at 8A). See *id.* at 7A-9A.

[REDACTED.]

ARGUMENT

Petitioner argues that this Court should take the extraordinary step of granting a petition for a writ of certiorari before the court of appeals renders its judgment, even though petitioner prevailed on the question presented in the district court. The Rules of this Court provide that the Court will grant certiorari before judgment "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

The Secretary of the Treasury, the Director of the Secret Service, and the United States as the holder of the privilege regard the protective function privilege as being of great importance in ensuring the safety of the President. We therefore fully agree with petitioner that the question of privilege presented in this case is of great moment and warrants prompt resolution. But, in the end, we are unable to conclude that this case requires the extraordinary procedure of certiorari before judgment. That is so for three reasons considered in combination: First, the privilege has been forcefully asserted, defended, and maintained by the Secretary of the Treasury, the Director of the Secret Service, and the Attorney General throughout the instant litigation. Second, the United States as holder of the privilege [REDACTED] will be prepared to file its opening brief in that court on June 15 [REDACTED]. Third, this Court may benefit from review by the court of appeals in a case of this impor-

tance, since the single district judge who rejected the claim of privilege in this case is the only judge to have passed on the question at any level. If the Court concludes, however, that the circumstances of this case considered more broadly require immediate review by this Court, the petition for a writ of certiorari before judgment should be granted.

1. Petitioner contends (Pet. 12-13) that this case warrants immediate review because the Director of the Secret Service has determined that, if the claim of protective function privilege is rejected, the erosion of the confidential relationship between the President and Secret Service agents will increase the prospect that an assassin may succeed in killing a sitting President. Although petitioner rejects the Director's professional judgment and argues that the Court should not recognize the protective function privilege, he readily concedes that "the physical safety of the President is a matter of urgent national and public concern." Pet. 12; see Pet. 12-13.

The Director—and the United States as the holder of the privilege—are fundamentally concerned about the threat to the President's safety that would arise if the federal judiciary were ultimately to reject the formal assertion of the protective function privilege in this case. The decision of a single district judge rejecting the claim of privilege does not, however, appreciably change the status quo, at least with the prospect of expedited review through the appellate process. There has been uncertainty for some time as a result of the Independent Counsel's seeking—for the first time in the Nation's history—to compel such testimony from Secret Service personnel concerning matters arising in their performance of their protective function in proximity to the President. But

the United States as holder of the privilege has throughout firmly opposed those efforts to breach the privilege; and once a motion to compel the testimony was filed, the Secretary of the Treasury, with the concurrence of the Attorney General, formally asserted the privilege. Thus, the privilege has been asserted, defended, and maintained as an operational matter while the investigation and litigation have proceeded.

The court of appeals will now review the issue of law *de novo*, and whatever degree of uncertainty has existed since petitioner first demanded Secret Service testimony will simply persist pending appellate review. If the court of appeals reverses the district court's ruling, then there will be no urgent need for this Court's review arising from the Director's concern for the President's safety. If the court of appeals affirms, then this case will be ripe for the Court's review. In either event, there would be no "imperative" need for this Court to deviate from "normal appellate practice" (Sup. Ct. R. 11) and make an immediate, expedited determination without the benefit of the court of appeals' views.[3]

The Director's overriding concern for the Secret Service's ability to protect a sitting President is fundamental. But there is no reason to doubt that the

---

[3] If petitioner at some point sought to alter the status quo, "normal appellate practice" provides adequate mechanisms to control the potential consequences of the district court's decision. If necessary, respondents may move for a stay from the district court or the court of appeals. If those courts deny a stay, respondents may then apply to this Court for relief. Sup. Ct. R. 23. Petitioner's approach by-passes that traditional and familiar avenue for maintaining the status quo pending appellate review.

court of appeals "will recognize the vital importance of the time element in this litigation." *Aaron* v. *Cooper*, 357 U.S. 566, 567 (1958). As noted above, the United States as holder of the privilege [REDACTED] will be prepared to file its opening brief in that court on June 15 (the same date on which petitioner proposes that the parties file simultaneous opening briefs in this Court). [REDACTED.]

2. Petitioner also contends that this case warrants immediate review because of "the Nation's interest that this case be resolved expeditiously so that the grand jury's inquiry can be completed at the earliest practicable date." Pet. 13; see also Pet. 13-16. Petitioner presses the same argument in its other pending petition for a writ of certiorari before judgment, which addresses questions concerning the attorney-client privilege and work product doctrine. See *United States* v. *Clinton, et al.*, No. 97-1924 (filed May 28, 1998).

The strong public interest in expeditious grand jury proceedings is beyond question in this case. The parties in No. 97-1924 have presented the Court with their perspectives on the public importance of the investigation and the appropriateness of certiorari before judgment in that case. Because the Attorney General and the Solicitor General do not represent the prosecutorial interests of the United States in the underlying investigation, we do not take a position on whether those circumstances are comparable to past situations in which the Court has granted certiorari before judgment in the court of appeals. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361 (1989); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *United States* v. *Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952);

cf. *Aaron* v. *Cooper*, *supra*. We simply note that, if the Court concludes that those interests in expedition advanced by petitioner are insufficient to warrant granting the petition for a writ of certiorari before judgment in No. 97-1924, they presumably would be insufficient in this case as well.

3. In a brief argument on the merits, petitioner challenges the validity of the protective function privilege. Pet. 16-17. Petitioner contends that it is a novel concept, arguing that "[o]utside 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" (Pet. 17). The absence of judicial opinions and commentary discussing the privilege simply underscores the unprecedented nature of the Independent Counsel's efforts to breach the relationship of trust and confidence that has long been critical to the work of the Secret Service.[4]

Rule 501 of the Federal Rules of Evidence provides that "the privilege of a witness * * * [or] government * * * 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." This Court set forth the governing principles of the common law in *Jaffee* v. *Redmond*, 518 U.S. 1, 9 (1996). There, the Court stated that "we start with the primary assumption that there is a general duty

---

[4] The testimony of Secret Service agents in the prosecution of John Hinckley for the attempted assassination of President Reagan, cited by the district court (see Pet. App. 6A), was obviously in furtherance of the purposes of the privilege of protecting the safety of the President.

to give what testimony one is capable of giving," *ibid.* (quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)), but that "[e]xceptions from the general rule disfavoring testimonial privileges may be justified * * * by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth,'" *ibid.* (quoting *Trammel* v. *United States*, 445 U.S. 40, 50 (1980)). Here, an exception is justified by the transcending national importance of protecting the life and safety of the President, and by the "imperative need for confidence and trust" (*Jaffee*, 518 U.S. at 10 (quoting *Trammel*, 445 U.S. at 51)) between the President and the Secret Service that is necessary to ensure such protection.

Here, as in *Jaffee*, both "reason and experience" establish the basis for the privilege. The experience of the Nation with respect to assassinations and attempted assassinations of the President vividly illustrates the compelling need to ensure protection for the President. To avoid the repetition of such a calamity, the Secret Service has adopted a protocol for protecting the President that places an absolute premium on continual and unquestioned physical proximity. The uncontradicted factual record below establishes the need for Secret Service personnel to have proximity to the President.[5] As the record below shows, the absence of such proximity made it impossible for Secret Service personnel to prevent the assassinations of Presidents McKinley and Kennedy, and

---

[5] Petitioner filed no affidavits to dispute the submission by the present Director and two former Directors of the Secret Service, and former President Bush, regarding the need for the privilege to ensure that Secret Service personnel can maintain the requisite proximity to the President.

the presence of agents in proximity to President Reagan apparently saved his life. Both the most basic of reasons and the long experience described in the record below establish that a relationship of complete trust and confidence is essential to ensure protection for the President.[6]

Although petitioner "doubts" the existence of any causal link between grand jury testimony by Secret Service personnel and the pushing away by the President that the Director fears (see Pet. 13), it chose not to make any factual submission whatever to the contrary. The unsupported doubts of petitioner cannot overcome the considered professional judgment of the Director, on the basis of his own experience and that of the Secret Service over time, that the privilege is critical to maintaining a relationship of trust—a judgment supported by two prior Directors of the Secret Service and former President Bush. It also is essential to bear firmly in mind that the assassination of a President causes grave injury to the Nation's democratic institutions and traditions, potentially threatens its security, and visits profound

---

[6] Petitioner suggests (Pet. 16) that 28 U.S.C. 535(b) "preempt[s]" recognition of a protective function privilege under Rule 501. Section 535(b), however, does not speak to the question in this case. Section 535(b) generally requires the head of any department or agency to report to the Attorney General "[a]ny information * * * relating to violations of title 18 involving Government officers and employees." Nothing in the language or background of Section 535(b) reveals any intention to override testimonial privileges that the Attorney General, on behalf of the United States, might otherwise assert. Nor does Section 535(b) implicitly repeal the Attorney General's authority (see 28 U.S.C. 516) and discretion to determine whether governmental privileges should be asserted or waived in litigation.

trauma upon its people. Especially in light of those consequences, any doubts regarding the need for confidentiality to ensure a relationship of trust and confidence between the President and the Secret Service must surely be resolved in favor of the considered judgment of those charged by Congress with the protection of the President.

* * * * *

The interests underlying the privilege we have asserted are of paramount significance to the Nation's security. Accordingly, the legal question in this case should be resolved as expeditiously as is consistent with orderly and sound judicial process. Expedited review in the court of appeals, followed (if necessary) by expedited consideration in this Court, can meet the security needs at stake while providing the thoughtful consideration that a first tier of appellate review provides. We recognize that petitioner has asserted that the underlying investigation requires even greater expedition. If this Court, in deference to the important interests at issue, determines that its immediate intervention is appropriate and warranted, we have no objection to that course of proceeding. Otherwise, the extraordinary expedition represented by certiorari before judgment should be denied.

CONCLUSION

If the Court concludes that the important interests at issue require immediate review by this Court, the petition for a writ of certiorari before judgment should be granted. Otherwise, the petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JUNE 1998