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The Law of Privilege: Obstacles on the Road to Recognition

Kelly S. Bopp

THE LAW OF PRIVILEGE: OBSTACLES ON THE ROAD TO RECOGNITION

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

*Kelly S. Bopp**

Appellant, the Secretary of the Treasury,[1] attempted to prevent United States Secret Service officers from being compelled to testify before a federal grand jury by invoking the "protective function privilege."[2] Appellee, the Office of the Independent Counsel, sought to compel the testimony as part of its presidential investigation.[3] Appellant asserted that the information sought by appellee included observations made and statements overheard while protecting the President and thus, should be protected by the privilege.[4] The Secret Service alleged that the privilege was necessary to carry out its statutory duty of protecting the President.[5] Arguing that it would enhance presidential security, the Secret Service asserted that the privilege would "lessen[] any tendency of the President to 'push away' his protectors" in an effort to secure privacy.[6] Appellee argued that recognition of the privilege would undermine congressional intent as expressed in 28 U.S.C. 535(b).[7] The United States District Court for the

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* The author would like to dedicate this Case Comment to her mother, father, and sister for their confidence, support, and love.

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). Appellant was responsible for overseeing the Secret Service. *See id.*

2. *Id.* The asserted privilege sought to "absolutely protect[] ' information obtained by Secret Service personnel while performing their protective function in physical proximity to the President.'" *Id.* at 1075. Testimony "concerning observations or statements that, at the time they were made, were sufficient to provide reasonable grounds for believing that a felony ha[d] been, [wa]s being, or . . . [would] be committed" was not said to be privileged. *Id.*

3. *See id.* Apparently, this was the first attempt in the history of the United States to compel the testimony of officers guarding the President. *See id.* at 1076.

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

5. *See Grand Jury Proceedings I*, 148 F.3d at 1076. *See also* 18 U.S.C.A. § 3056-(a)(1) (West 1998). This statute provides, in relevant part: "Under the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect . . . [t]he President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect." *Id.*

6. *Sealed Case*, 148 F.3d at 1076. The Secret Service submitted declarations by former senior agents and a letter from President Bush supporting the privilege. *See id.* at 1076.

7. *See Grand Jury Proceedings*, 1998 WL 272884, at *2; *see also* 28 U.S.C. § 535(b) (1998) (imposing a duty on all executive branch personnel to report criminal activity by government officers and employees to the Attorney General).

District of Columbia refused to recognize the privilege because it did not have federal or state history.[8] The district court also found that the Secret Service arguments were not strong enough to overcome the interest in obtaining evidence.[9] The District of Columbia Court of Appeals concluded that the Secret Service failed to show the necessity of the privilege[10] by a clear and convincing standard required under Federal Rule of Evidence 501.[11] Thus, the United States Court of Appeals affirmed the decision of the district court and HELD, that the protective function privilege could not protect the officers from being compelled to testify.[12]

Historically, courts have valued the adversarial demand for probative evidence and have been reluctant to recognize new evidentiary privileges.[13] For instance, in *Trammel v. United States*, the United States Supreme Court determined that the need for probative evidence outweighed the justification for the marital evidentiary privilege.[14] In *Trammel*, the defendant sought to invoke the marital privilege to prevent his wife from testifying against him about his involvement in a conspiracy.[15] The district court refused to allow the defendant full protection of the marital privilege

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8. *See Grand Jury Proceedings*, 1998 WL 272884, at *2. The district court reasoned that the Supreme Court only recognized a new privilege "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." *Id.* The court found that the protective function privilege satisfied none of the above. *See id.*

9. *See Sealed Case*, 148 F.3d at 1074; *see also Grand Jury Proceedings*, 1998 WL 272884, at *5.

10. *See Sealed Case*, 148 F.3d at 1076. The United States Court of Appeals stated that Federal Rule of Evidence 501 required showing the need for the privilege with compelling clarity. *See id.*

11. *See* FED. R. EVID. 501. Federal Rule of Evidence 501 provides in pertinent part that:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress . . . ' the privilege of a witness . . . 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.

Id.

12. *See Sealed Case*, 148 F.3d at 1079.

13. *See* Jaffee v. Redmond, 116 S. Ct. 1923, 1927 (1996) (Scalia, J., dissenting). The courts have rejected new privileges in an effort to adhere to the principle that evidentiary privileges are in derogation of the search for truth. *See id.* (Scalia, J., dissenting); *see also* Trammel v. United States, 100 S. Ct. 906, 912 (1980). Courts have held that privileges "must be strictly construed and accepted 'only to . . . [a] very limited extent'" in order to preserve the principle that the public has a right to every man's evidence. *Trammel*, 100 S. Ct. at 912 (citations omitted).

14. *See Trammel*, 100 S. Ct. at 913.

15. *See id.* at 908. In *Trammel*, the prosecution called the defendant's wife as an adverse witness. *See id.* The defendant's wife voluntarily testified, in detail, about her role and the role of the defendant in a heroin distribution conspiracy. *See id.*

and permitted his wife to testify for the prosecution.[16] In reaching its pretrial ruling, the district court reasoned that the marital privilege only protected confidential communications between a husband and wife.[17] At trial, defendant was found guilty.[18] In affirming the district court's decision, the United States Court of Appeals for the District of Columbia Circuit rejected defendant's claim, holding that the privilege did not prohibit voluntary testimony of a spouse.[19] The United States Supreme Court granted certiorari to consider whether the interest promoted by the spousal privilege was sufficiently important to outweigh the need for probative evidence.[20]

The *Trammel* Court emphasized the ability of the federal judiciary to develop rules of privilege on a case-by-case basis[21] and according to the reason and experience logic under Rule 501. Nevertheless, the Court recognized that the marital privilege had an established history dating back to medieval times.[22] According to the Court, the privilege was formulated to protect confidential communications between husband and wife and to foster the harmony and sanctity of marriage.[23] However, the Court rationalized that when one spouse volunteers to testify against the other, the marital harmony is already broken, leaving nothing to preserve.[24] Thus, the purpose of the privilege would not be served by applying it to such situations.[25]

In *Trammel*, the Court found that the privilege substantially interfered with the fundamental principle of ascertaining the truth.[26] Moreover, the purpose of the marital privilege would not be served in the instant case.[27] The *Trammel* Court concluded that the "'reason and experience'" logic under Rule 501 did not justify recognition of a privilege against adverse

16. *See id.* The district court held that confidential communications between the defendant and his wife were protected by the marital privilege. *See id.* However, the district court found that any observations the wife made during the marriage and any conversations she had with the defendant in the presence of a third person, were not protected by the privilege. *See id.*

17. *See id.*

18. *See id.*

19. *See id.* at 909. The wife in *Trammel* appeared as an unindicted co-conspirator under grant of immunity from the Government in return for her testimony. *See id.*

20. *See id.* at 908.

21. *See id.* at 910.

22. *See id.* at 909.

23. *See id.* at 913. The spousal privilege originated, first, from the rule that an accused was not allowed to testify on his own behalf, and second, from the understanding that a husband and wife were one and the same. *See id.* at 909.

24. *See id.* at 913.

25. *See id.*

26. *See id.*

27. *See id.* The Court found that the ancient foundations on which the privilege was based were no longer applicable in contemporary society. *See id.*

spousal testimony.[28]

The United States Supreme Court also addressed the law of evidentiary privilege in *University of Pennsylvania v. EEOC*.[29] In *University of Pennsylvania* (*Penn*), respondent, the Equal Employment Opportunity Commission, was conducting an investigation of charges that petitioner had determined tenure awards in a racially and sexually discriminatory manner.[30] Petitioner, the University of Pennsylvania, sought to invoke a new privilege protecting peer review materials utilized in making tenure decisions.[31]

Asserting that the confidentiality of the peer review process was a necessary function of many colleges and universities, petitioner urged that it should be protected by a privilege.[32] Respondent argued that the peer review materials were necessary to conduct a thorough investigation of the charges.[33] The *Penn* Court, like the *Trammel* Court, required petitioner to demonstrate a sufficiently important interest that would outweigh the need for probative evidence.[34]

The Court determined that petitioner's asserted justification for the privilege, confidentiality of the peer review process, was an insufficient objective because it left uncertain whether failure to recognize the privilege would actually hinder the peer review process.[35] Additionally, the *Penn* Court emphasized that Congress had not recognized a privilege protecting peer review materials.[36] The Court asserted that it would "stand behind the breakwater Congress ha[d] established" and avoid recognizing a privilege that Congress had not previously identified. Thus, because Congress had not identified a privilege that would apply to peer review materials, the

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28. *Id.* at 914.

29. 110 S. Ct. 577, 578 (1990).

30. *See id.* at 580. Respondent charged that the department chairman had sexually harassed her and, because she did not accept his advances, wrote a negative letter to the tenure-review committee. *See id.*

31. *See id.* The materials to be disclosed were the tenure-review files of the professor alleging discrimination and those files of five male faculty members identified as having received more favorable treatment on account of their race and sex. *See id.*

32. *See id.* at 582. The appellant argued that these institutions are exceptional because they foster learning, discovery and innovation. *See id.* Also, the appellant rationalized that if peer evaluations were disclosed and made public, a "'chilling effect'" on candid evaluations would result. *Id.* at 586.

33. *See id.* at 580. The Commission found that the petitioner did not supply enough data to determine whether there was reasonable cause to believe the allegations of discrimination. *See id.* at 580-81.

34. *See id.* at 582 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).

35. *See id.* at 587.

36. *See id.* at 584. Congress did address situations in which an employer would have an interest in the confidentiality of its records but these did not include peer review materials. *See id.*

Penn Court refused to recognize the privilege.[37]

Six years after it decided *Penn*, the United States Supreme Court recognized the first evidentiary privilege under Rule 501 in *Jaffee v. Redmond*.[38] In *Jaffee*, defendant sought to invoke a psychotherapist-patient privilege.[39] The asserted privilege would prevent the disclosure of confidential communications made by a patient to a clinical social worker during counseling sessions.[40] The *Jaffee* Court found that a novel privilege may be justified if the public good outweighed the need for probative evidence.[41] The Court reasoned that successful psychiatric treatments depended upon patients' abilities to talk freely with their psychotherapists.[42] According to the Court, appropriate treatment for individuals suffering from mental or emotional problems was a substantially important public good.[43]

The *Jaffee* Court further reasoned that a psychotherapist-patient privilege was justified by the fact that all fifty states and the District of Columbia had enacted some form of the privilege.[44] The Court rationalized that consensus among state legislatures satisfied the "'reason and experience'" logic under Rule 501.[45] Holding that the privilege promoted important public interests which outweighed the need for probative evidence, the *Jaffee* Court recognized a psychotherapist-patient privilege.[46]

In the instant case, the United States Court of Appeals for the District of Columbia Circuit departed from previous interpretations of Rule 501.[47] Like the *Jaffee* Court, the instant court found that judicial recognition of a new privilege depended upon whether the privilege would enhance a public good.[48] However, the instant court held that Rule 501 required the Secret Service to demonstrate the need for the protective function privilege

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37. *Id.* at 585. The Court rationalized that Congress itself could revise the statute. *See id.*

38. 116 S. Ct. 1923, 1932 (1996).

39. *See id.* at 1926. The defendant, a former police officer, pursued counseling after she shot and killed an individual while on patrol duty. *See id.* at 1925. The individual was the subject of the estate commencing the action. *See id.*

40. *See id.* The materials sought in *Jaffee* were notes concerning 50 counseling sessions for use in cross-examining the defendant. *See id.*

41. *See id.* at 1931.

42. *See id.* at 1928. The Court asserted that communications made during counseling sessions may contain embarrassing or disgraceful information due to the sensitive nature of the underlying problems which compel counseling in the first place. *See id.*

43. *See id.* at 1929. Determining the public good implemented by the privilege, the Court found that the mental health of the citizenry was no less important than its physical health. *See id.*

44. *See id.*

45. *Id.* at 1930.

46. *See id.* at 1928.

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

48. *See id.* (citation omitted).

by a "clear and convincing" standard.[49]

In an attempt to meet this standard, the Secret Service argued that, in the absence of such a privilege, the President would be inclined to push away his protectors when seeking privacy.[50] The Secret Service alleged that this avoidance of protection would endanger the President.[51] The instant court acknowledged that the safety of the President constituted a public good and that it was the duty of the Secret Service to ensure the President's safety.[52] However, the court found that the Secret Service's arguments failed to "clearly and convincingly" demonstrate that an absence of the privilege would endanger the President.[53] The court concluded that if such a privilege were appropriate, it would have to be recognized by Congress.[54]

In reaching its holding, the instant court departed from the language of Rule 501.[55] Rule 501 authorizes courts to accept new privileges according to the principles of the common law and in light of reason and experience.[56] Asserting that Rule 501 required a compelling justification for recognition of an evidentiary privilege, the instant court extrapolated a "clear and convincing" standard of proof from Rule 501.[57] However, the "clear and convincing" standard is not written in Rule 501[58] and previous courts have not utilized it.[59]

Prior cases have applied Rule 501 without the "clear and convincing" standard.[60] The *Trammel* Court, for example, measured the persuasiveness of an asserted privilege against the need for probative evidence without requiring the defendant to justify the privilege by a "clear and convincing"

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49. *Id.*

50. *See id.*

51. *See id.* In addition, the Secret Service argued that incoming Presidents generally do not appreciate security risks. *See id.* at 1077.

52. *See id.* at 1076.

53. *Id.* (adding that "vague fears extrapolated beyond any foreseeable threat" were insufficient) (citation omitted).

54. *See id.* at 1079. The instant court stated that if Congress decided a protective function privilege were appropriate to protect the President, then Congress should define the "contours" of the privilege. *Id.*

55. *See id.* at 1076. The instant court stated that recognition of the privilege depended "entirely upon the Secret Service's ability to establish clearly and convincingly both the need for and the efficacy of the proposed privilege." *Id.* However, the language of Rule 501 does not contain the "clear and convincing" legal standard. *See* FED. R. EVID. 501.

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

57. *See id.* Reiterating the application of the standard, the instant court asserted that the Supreme Court required a party seeking recognition of an evidentiary privilege to demonstrate its need with a high degree of clarity and certainty. *See id.*

58. *See* FED. RULES OF EVID. 501.

59. *See Sealed Case*, 148 F.3d at 1075; *see also* Trammel v. United States, 100 S. Ct. 906, 911 (1980); *Penn*, 110 S. Ct. at 189; *Jaffee*, 116, S. Ct. at 1927.

60. *See, e.g.*, University of Pennsylvania v. EEOC, 110 S. Ct. 577 (1990).

standard.[61] Instead, the *Trammel* Court referred to reason and experience as decision-making tools for analyzing a new privilege.[62] The phrase "reason and experience" came directly from the language of Rule 501.[63] Applying the "reason and experience" standard, the *Trammel* Court determined that the purpose of a marital privilege would not be served by prohibiting voluntary spousal testimony.[64]

Quoting Rule 501, the instant court mentioned "reason and experience" only once in its opinion.[65] Retreating from the principal holding espoused by the *Trammel* Court, the instant court based its holding on the Secret Service's failure to carry its heavy burden of proof rather than what was dictated by reason and experience.[66] By declining to utilize the reason and experience logic under Rule 501, as the Court did in *Trammel*, the instant court confined the Secret Service to its clear and convincing demonstration.[67] This restraint significantly narrowed the grounds for recognition of the protective function privilege.

Additionally, by requiring the heavy burden of a clear and convincing standard of proof, the instant court substantially decreased the chances that a privilege without history could be invoked.[68] The *Jaffee* Court, for instance, did not require this heavy burden of proof.[69] In *Jaffee*, the Court rationalized that successful psychiatric treatment was a public good justifying the privilege.[70] Additionally, the *Jaffee* Court held that state acceptance of the psychotherapist-patient privilege satisfied the reason and

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61. *See Trammel*, 100 S. Ct. at 912. The *Trammel* Court observed that Congress, by enacting Rule 501, manifested an affirmative intention to not freeze the law of privilege. *See id.* at 911. In *Trammel*, the issue to be decided was whether the privilege against spousal testimony promoted sufficiently important interests to outweigh the need for probative evidence. *See id.* at 912.

62. *See id.* at 914; *see also id.* at 912 (Stewart, J., concurring). The concurring opinion in *Trammel* identified that the Court refused to recognize the proposed privilege because of the change in perception that "reason and experience" prescribed. *Id.* (Stewart, J. concurring).

63. *See id.* at 910; *see also* FED. R. EVID. 501.

64. *See Trammel*, 100 S. Ct. at 914.

65. *In re* Sealed Case, 148 F.3d 1073, 1075 (D.C. Cir.), *cert. denied*, Rubin v. United States, 119 S. Ct. 461 (1998) (quoting FED. R. EVID. 501).

66. *See id.* at 1079. The instant court held that the Secret Service failed to carry its heavy burden of establishing the need for the protective function privilege it sought to assert. *See id.*

67. *See id.* at 1076. The court rationalized that the Secret Service had to demonstrate, clearly and convincingly, that recognition of the privilege would materially enhance presidential security. *See id.*

68. *See id.* at 1079. Deciding the instant case, the court asserted that it was a heavy burden which the Secret Service failed to establish. *See id.*

69. *See* Jaffee v. Redmond, 116 S. Ct. 1923, 1927 (1996). The *Jaffee* Court reasoned that the law of privilege may be dictated by reason and experience. *See id.*

70. *See id.* at 1928. The *Jaffee* Court cited to briefs from the American Psychiatric Association and American Psychological Association. *See id.* The Court formed its own rationale that the possibility of psychotherapist disclosure may impede development of the confidential relationship for successful treatment. *See id.*

experience logic under Rule 501.[71]

Similar to the *Jaffee* Court, the instant court embraced the purpose of the privilege,[72] and accepted the Secret Service's argument that the safety of the President constituted a public good of utmost importance.[73] However, the instant court went further than the *Jaffee* Court and demanded that the Secret Service clearly and convincingly establish the connection between the purpose and the privilege.[74] The instant court held that the Secret Service failed to meet the clear and convincing standard because the arguments that the purpose of the privilege would be served were speculative.[75] However, the arguments of the Secret Service appeared no less conclusive than the reasoning of the Court in *Jaffee*.[76] The critical difference between the two cases was that the privilege in the instant case was a novelty[77] and the privilege discussed in *Jaffee* had a history of state legislation.[78]

Ultimately, by injecting a clear and convincing standard into Rule 501, the instant court would reject any novel privilege which lacked historical consideration, absent compelling proof that the privilege would indeed further a public good.[79] According to the instant court, speculated assertions alone do not clearly and convincingly demonstrate the need for the protective function privilege.[80] By comparison, in *Jaffee*, state legislatures had previously considered the question of psychotherapist-

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71. *See id.* The Court in *Jaffee* ascertained that state legislatures were fully aware of the need to protect the integrity of the fact-finding functions of their courts. *See id.*

72. *See Sealed Case*, 148 F.3d at 1076. The court acknowledged that the Office of the Independent Counsel readily acknowledge the importance of Presidential safety. *See id.*

73. *See id.*

74. *See id.* The court asserted that recognition of the privilege depended entirely upon the Secret Service's ability to demonstrate that the privilege would enhance Presidential security. *See id.*

75. *See id.* at 1076. The instant court found that all arguments made by the Secret Service, other than assertions that the safety of the President was a profound national interest, were largely based on speculation. *See id.*

76. *Cf.* Jaffee v. Redmond, 116 S. Ct. at 1924, 1934 (1996) (Scalia, J., dissenting). In *Jaffee*, Justice Scalia, in his dissent, argued that the majority opinion merely mentioned the values associated with a psychotherapist privilege. *See id.* (Scalia, J., dissenting). According to Justice Scalia, the mere mention of such values did not justify the importance of the privilege. *See id.* (Scalia, J., dissenting).

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

78. *See Jaffee*, 116 S. Ct. at 1929.

79. *See Sealed Case*, 148 F.3d at 1076. If the instant court increased the burden of proof, due to the absence of previous consideration, it did not acknowledge the distinction. *See id.* In fact, the instant court reasoned that a lack of precedent, due to the novelty of the instant case privilege, did not weigh heavily against its recognition. *See id.*

80. *See id.* at 1079. The instant court alleged that the need for the protective function privilege was scant and inconclusive. *See id.*

patient privilege and rendered it necessary.[81] Thus, unlike the instant case, the privilege in the *Jaffee* case had history behind it.[82]

The motive behind the instant court's demand for a clear and convincing demonstration is seemingly driven by the lack of historical consideration.[83] Yet, it is the absence of historical consideration which seems to prevent the Secret Service from meeting the clear and convincing standard of proof.[84] The instant court's reasoning is, hence, circular.

In addition to reading a clear and convincing standard into Rule 501, the instant court departed from the language of the rule in another facet of its decision.[85] The purpose of Rule 501 is to authorize the courts to recognize new evidentiary privileges.[86] Similar to the *Penn* Court, the instant court asserted that Congress could establish the proposed privilege if it felt the privilege was appropriate.[87] The *Penn* Court boldly refused to recognize a peer review privilege based on the fact that Congress had previously considered it but failed to recognize the privilege itself.[88] Although the instant court did not make its decision contingent upon congressional approval, the responsibility of Congress was nonetheless referenced.[89]

According to Rule 501, congressional approval is not a prerequisite for the court's recognition of a privilege.[90] Despite adhering to the *Penn* decision, the instant court disregarded the language of Rule 501 by transferring the privilege issue to Congress.[91] In departing from the language of Rule 501, both the *Penn* Court and the instant court declared that it was up to Congress, not the courts, to create new privileges.[92]

Thus, the instant court departed from the plain mandate of Rule 501 in two ways. First, the instant court required a clear and convincing standard

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81. *See Jaffee*, 116 S. Ct. at 1929. The *Jaffee* Court found that it was appropriate to consider consistent policy determinations by state legislatures as indicators of recognition. *See id.*

82. *See id.*

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

84. *See id.* at 1079. The instant court alleged that the need for the protective function privilege was scant and inconclusive. *See id.*

85. *See id.* The instant court concluded the case by leaving the privilege recognition question to Congress. *See id.*

86. *See* Rubin v. United States, 119 S. Ct. 461 (1998), *denying cert. to* 148 F.3d 1073 (D.C. Cir. 1998) (Breyer, J., dissenting)). Justice Breyer, in dissent, asserted that Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them. *See id.*(Breyer, J., dissenting).

87. *Cf. Sealed Case*, 148 F.3d at 1079.

88. *See Penn*, 110 S. Ct. at 189.

89. *See Sealed Case*, 148 F.3d at 1079.

90. *See id.*; *see also* FED. R. EVID. 501.

91. *See Sealed Case*, 148 F.3d at 1079.

92. *Cf.* Michael Grunwald, *'Protective Function Privilege' Is Proposed; Democrats Seek to Shield Secret Service*, WASH. POST, September 17, 1998, at A17.

of proof before the recognition of a new privilege. Second, the instant court passed the responsibility of recognizing new privileges to Congress. Now it is virtually impossible for new privileges to be acknowledged by the courts because the courts view historical consideration or congressional acceptance as essential for recognition. If the instant court had followed the language of Rule 501, the court's own reason and experience would have played a larger role. This reasoning would have prevented the court from passing the buck, so to speak, to the state legislatures or Congress. Ultimately, reason and experience would afford a new privilege the opportunity it deserves to be recognized under Rule 501.