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H. RES. 480

Expressing the sense of the House of Representatives concerning the assertion of protective function privilege.

IN THE HOUSE OF REPRESENTATIVES

JUNE 19, 1998

Mr. DELAY submitted the following resolution; which was referred to the Committee on the Judiciary

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RESOLUTION

Expressing the sense of the House of Representatives concerning the assertion of protective function privilege.

Whereas the Office of the Independent Counsel and a Federal grand jury are investigating allegations of personal wrongdoing and possible crimes in the White House;

Whereas certain Secret Service agents asserted a ''protective function privilege'' and refused to answer questions before a Federal grand jury (*In Re Grand Jury Proceedings,* Misc. No. 91–148 (NHJ), *redacted version* at 1, (D.D.C. May 22, 1998) (hereinafter referred to as *''Grand Jury Proceedings''*));

Whereas ''[n]one of the questions at issue relate to the protective techniques or procedures of the Secret Service'' (*Grand Jury Proceedings* at 1);

Whereas Federal Rule of Evidence 501 provides that evidentiary privileges ''shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience'';

Whereas the Supreme Court has interpreted Rule 501 to require courts to consider whether the asserted privilege is historically rooted in Federal law, whether any States have recognized the privilege, and public policy interests (*Grand Jury Proceedings* at 2, *citing Jaffee v. Redmond,* 518 U.S. 1, 12–15 (1996));

Whereas the Supreme Court has emphasized that it is ''disinclined to exercise [its] authority [under Rule 501] expansively'' (*University of Pennsylvania v. EEOC,* 493 U.S. 182, 189 (1990)) and has cautioned that privileges ''are not lightly created nor expansively construed, for they are in derogation of the search for truth'' (*U.S. v. Nixon,* 418 U.S. 683, 710 (1974));

Whereas the district court found ''no constitutional basis for recognizing a protective function privilege,'' ''no history of the privilege in Federal common or statutory law,'' ''[n]o State [recognition of] a protective function privilege or its equivalent,'' and ''the policy arguments advanced by the Secret Service are not strong enough to overcome the grand jury's substantial interest in obtaining evidence of crimes or to cause this Court to create a new testimonial privilege'' (*Grand Jury Proceedings* at 3, 6–9);

Whereas no administration has ever sought congressional enactment of a protective function privilege;

Whereas Chief Judge Norma Holloway Johnson refused to establish a protective function privilege (*Grand Jury Proceedings* at 9) and correctly noted such claims should be made to Congress, not to the courts (*Grand Jury Proceedings* at 4);

Whereas the Attorney General, who is the Nation's chief law enforcement official, should not assert claims of privilege, such as the protective function privilege, that have no basis in law and the assertion of which substantially delays the work of the grand jury;

Whereas former Attorneys General Barr, Thornburgh, Meese, and Bell encouraged Attorney General Reno to forego appealing the district court's decision because they believe the decision was ''legally and historically well-founded,'' and ''any appeal would likely result in an opinion that would only magnify the precedential damage to the Executive Branch'' (Letter from Professor Jonathan Turley to Attorney General Reno, May 25, 1998); and

Whereas the Attorney General has appealed the district court's decision: Now, therefore, be it

Resolved, That it is the sense of the House that the President of the United States, if he believes such a policy is warranted, should submit to the Congress proposed legislation which would establish a protective function privilege and also direct the Attorney General to immediately withdraw the appeal of the district court's decision in the matter styled *In Re Grand Jury Proceedings,* Misc. No. 91–148 (NHJ), *redacted version,* (D.D.C. May 22, 1998).

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