DO EVEN PRESIDENTS HAVE PRIVATE LIVES?

The Case for Executive Privacy as a Right
Independent of Executive Privilege

René Reyes*

I. INTRODUCTION

The presidency of George W. Bush has been marked by a bold reassertion of executive privilege.1 While executive privilege may manifest itself in a number of forms, “[i]t is most easily defined as the right of the president and high-level executive branch officers to withhold information from those who have compulsory power—Congress and the courts (and therefore, ultimately, the public).”2 In other words, executive privilege is a means of maintaining control over certain information in the face of demands that such information be made public.

An abundance of scholarly and popular writing has been produced on the subject of executive power and privilege during the Bush presidency.3 It is not the purpose of this article to add to the body of literature on this issue but rather to address a means of maintaining control over information that is separate and distinct from executive privilege—namely, executive privacy.

For purposes of this article, executive privacy is defined as a president’s right to control information regarding his or her personal life. Although the subject has not received much attention of late, executive privacy has been no less controversial than executive privilege in the past—witness the dispute

* Climenko Fellow and Lecturer on Law, Harvard Law School. A.B. Harvard College, J.D. Harvard Law School. I would like to thank Charles Fried, Daniel Meltzer, Jessica Reyes, Carol Steiker, and Lloyd Weinreb. Comments are welcome at reyes@post.harvard.edu
over Secret Service testimony regarding the president’s private sexual relations during the 1998-1999 impeachment of President Bill Clinton. Notably, however, the sources and contours of this right have never been given a thoroughgoing analysis in legal academic literature.

This is not to suggest that commentary on presidential privacy has been wholly lacking. To the contrary, the Clinton impeachment ordeal produced numerous discussions in government, the media, and academia regarding the appropriateness of making the President’s sexual behavior a subject of investigation by the independent counsel and the Congress. “Even presidents have private lives,” said Mr. Clinton as he asked the country to put the affair to rest. A leading scholar echoed this sentiment shortly after the President’s acquittal, writing that “[a]mong the most basic of the constitutional inferences this impeachment process [has] reinforced is that consensual private intimacies, even when they have secondary public dimensions, fall uneasily if at all within the Government’s powers to investigate or to punish.” These and other statements rightly emphasized the private character of the acts that led to impeachment. These statements largely ignored, however, what may be the more significant issue: the means by which information about the President’s private acts can be obtained. For example, scholarly analysis paid relatively little attention to the privacy implications of legal rules that require the President to accept Secret Service protection at all times, and that place no restrictions on agents’ ability to testify about the substance of personal associations and conversations that they witness in the course of their duties.

---

6. Several articles did assess the “protective function” privilege that was proposed by the Secret Service and rejected by the federal courts, but did not devote much attention to privacy questions. See Ronald J. Baumgarten, Jr., Note, Protecting the President or Serving the Truth?: The Arguments For and Against the Protective Function Privilege, 80 B.U.L. REV. 233 (2000); Jennifer Diann Hallman, Note, Confidants or Tattle-Tales?: An Examination of the “Protective Function Privilege” Asserted by the United States Secret Service, 51 BAYLOR L. REV. 419 (1999); Julie Prouy, Comment, How Secret is the Service?: Exploring the Validity and Legality of a Secret Service Testimonial Privilege, 104 DICK. L. REV. 227 (1999); Kelly S. Bopp, Comment, The Law of Privilege: Obstacles on the Road to Recognition, 51 FLA. L. REV. 773 (1999); T. Spencer Crowley, III, Case Comment, Evidence: The Clinton Administration’s Battle to Gain Evidentiary Privilege for Secret Service Agents – Another Tainted Legacy?, 51 FLA. L. REV. 743 (1999); Stephen M. Rochford, Jr., Note and Comment, To Protect and Suppress: Why A Protective Function Privilege is Bad for America, 20 WHITTIER L. REV. 987 (1999). Other articles have briefly discussed privacy but have not explored the issue at length. See Akhil Reed Amar, Nixon’s Shadow, 83 MINN. L. REV. 1405 (1999); Randall K. Miller, Presidential Sanctuaries After the Clinton Sex Scandals, 22 HARV. J.L. & PUB. POL’Y 647 (1999). One article has argued that the President’s “right to be let alone” justifies recognition of the Secret Service’s protective function privilege, but this is a very different claim and a very different approach than is presented in this essay. See L. Darnell Weeden, Protecting the President’s Limited Expectation of Privacy During an Investigation May Justify the Protective Function Privilege for the Secret Service, 60 MONT. L. REV. 109 (1999). Other articles offered some analysis of presidential privacy rights, but on a much more limited scale than appears here. See Diana L. Charlton, Comment, Secret Service Testimony Regarding Presidential Activities: the Piracy of Privacy?, 43
While it has been several years since the Clinton presidency and the Secret Service testimony dispute ended, the reasons for examining presidential privacy remain compelling. Current and future presidents should be able to shape their personal behaviors and their expectations about the privacy of those behaviors within clearly-defined boundaries; they should not be left to navigate in unsettled legal terrain. Moreover, given that the current Congress is already pushing back against the Bush administration’s frequent and expansive assertions of executive privilege, there is a danger that all future claims of executive control over information will be treated with increased skepticism. It is therefore worth considering the case for an independent right of executive privacy outside the contested realm of executive privilege.

To that end, this article undertakes a long-overdue analysis of a president’s right to privacy. In Part II, I begin my analysis with a philosophical discussion of what privacy is, why it is valued, and how it is essential to human flourishing. In Part III, I offer an analysis of the legal dimensions of the right to privacy, along with a discussion of how the legal rules comport with the philosophical values outlined in the previous section. In Part IV, I examine the particular circumstances of the presidency, with the aim of demonstrating that the President retains a strong claim to a private sphere despite his public status. Next, in Part V, I consider the relationship between the President and the Secret Service and its impact on the President’s personal privacy. In Part VI, I advance an argument in favor of a limited presidential privilege that would prevent Secret Service agents from testifying about the substance of a president’s personal conversations and associations in most circumstances. Finally, in Part VII, I conclude by emphasizing the importance of executive privacy as a guarantor of liberty and equality for the President in his role as a citizen – one who remains subject both to the demands and protections of the law.

II. PHILOSOPHICAL AND MORAL DIMENSIONS OF PRIVACY

The first step in exploring the President’s right to privacy is to define precisely what the term “privacy” means. Intuitively, privacy is often thought of in terms of secrecy or a lack of information. As Charles Fried has argued, however, a conception of privacy that is limited to a mere absence of information about oneself in the minds of others is incomplete; the element of control over this information is needed to make privacy a meaningful idea. Fried offers the example of a lonely man stranded on a desert island to illustrate the point: though no one may have access to information about the


7. For a variety of definitions and analyses of privacy, see Ferdinand Schoeman, Privacy: Philosophical Dimensions of the Literature, in Philosophical Dimensions of Privacy: An Anthology 2-4 (Ferdinand Schoeman ed., 1984).

man’s life, most people would not say that he enjoys a right to privacy, other than perhaps in an ironic sense.9

Privacy, then, is defined for purposes of this paper as the degree of control a person has over information about herself. This control is not to be understood to apply only to the quantity of information, but rather to extend as well to the quality of information.10 An individual may not mind if a casual acquaintance knows that she is ill, for example, but might feel quite uncomfortable if the acquaintance were to know the details of her illness.11 Similarly, a person might be willing to reveal that he has had a conversation with a particular individual, yet be quite unwilling to disclose the details of their discussion. Privacy in its full sense allows people to modulate the extent of disclosures in this way, based both on the kind of information at stake and the relationship held with the person with whom information is shared.

Privacy as control over personal information is important for a number of reasons. Perhaps most fundamentally, privacy is vitally important because it enables individuals to form human relationships of the most valuable kind — relationships of love, friendship, and trust. Fried’s thesis is that privacy is essential for these kinds of intimate relationships because intimacy necessarily involves sharing information about one’s actions, thoughts, beliefs, and feelings that one does not share with everyone, and that one has a right not to share with anyone.12 Fried argues that in conferring the right to withhold personal information from all but those with whom we choose to share it, “privacy creates the moral capital we spend in friendship and love.”13 If this argument is accepted, along with the thesis that friendship and love are integrally related to human flourishing, then the right to privacy must surely be regarded as fundamental.14 Therefore, any intrusions into the right of privacy must be justified by compelling countervailing interests — for such intrusions have the potential to injure us in our very humanity.

In addition to promoting love, friendship, and trust in the personal sphere, privacy also fosters liberty, autonomy, and democracy in the political sphere. For instance, privacy serves the important function of empowering individuals to act, speak, or associate in ways that are not illegal or unethical, but are nonetheless unpopular or unconventional.15 If our every word and deed were broadcast to the public, the fear of sanctions might well prevent us from saying or doing what we otherwise might.16 This stifling would not only limit our freedom simply to be ourselves, but would also tend to inhibit the formulation and expression of new ideas. A right to privacy limits this inhibiting threat of

9. Id.
10. Id. at 483.
11. Id.
12. Id. at 484.
13. Id.
14. Here, I mean fundamental only in a moral sense, not in a constitutional sense.
15. Fried, supra note 7, at 483.
16. Id.
public disapproval, and thereby contributes both to liberty for its own sake, and to learning and creativity “by insulating the individual against ridicule and censure at early stages of groping and experimentation.”17

Similarly, a right of privacy contributes to liberty and democracy by promoting the independence and autonomy of individuals. As Professor Ruth Gavison has argued, privacy achieves this result by allowing individuals to evaluate social and political norms for themselves, free from the pressures of public opinion. Someone who has considered societal norms and values in this way is better able to participate in public discourse and political life more fully and responsibly, as the positions he advances and defends are truly his own. In addition, new and challenging positions are far more likely to be introduced into the public marketplace of ideas if they are first allowed to germinate in private among like-minded people.18 Privacy thus contributes to the broadening of the collective, as well as the individual, consciousness.

In a related manner, privacy contributes to liberty by allowing individuals to keep their political opinions and votes secret from each other and from government officials.19 This secrecy protects the integrity of the democratic process in obvious ways, such as by limiting the risk of coercion and retribution in the electoral process. In perhaps less obvious ways, privacy also enhances our democratic processes by allowing political parties and government officials to keep many of their opinions secret from the public.20 By shielding the substance of negotiations from full and immediate disclosure, privacy allows politicians to balance competing interests and work out compromises in a manner that would likely not be possible if everything were conducted in the public view.

On a more practical level, a strong commitment to privacy may also serve democracy by attracting more talented individuals to public life. As Gavison notes, it is undeniable that there are significant personal costs associated with running for government office; for example, in the course of a campaign, nearly every element of one’s life is subjected to public scrutiny.21 Many well-qualified individuals may be unwilling to subject themselves and their families to this kind of scrutiny, and not necessarily because they have damaging or embarrassing facts to hide. Rather, they may wish to avoid public investigation of their personal lives because they do not wish to sacrifice the benefits that a private sphere provides – namely, a secure sense of personhood and freedom. A strong societal respect for personal privacy would mitigate these costs of running for public office.22 A likely result would be an increase in the pool of qualified candidates, which might also result in a higher degree of excellence in government.

18. *Id.* at 450.  
19. *Id.* at 456.  
20. *Id.*  
21. *Id.* at 456.  
22. *Id.*
This section has now advanced several arguments in favor of a right to privacy at the moral and philosophical levels. The first line of argument focused on the importance of privacy in our personal lives; the second line of argument highlighted the essential role of privacy in our political lives. The next section will analyze the right to privacy at the legal level. This analysis will begin by exploring the ways and contexts in which privacy has been recognized under law, and then proceed to examine the extent to which legal recognitions of privacy reflect the values discussed up to this point.

### III. LEGAL DIMENSIONS OF PRIVACY

The argument for an explicit recognition of a legal right to privacy was first set forth by Samuel Warren and Louis Brandeis in an article appropriately entitled *The Right to Privacy*. In the hundred years since the publication of that article, the law has come to recognize and protect privacy in a number of contexts. This section will review these legal recognitions and protections, beginning with the constitutional jurisprudence of the Supreme Court, then moving on to consider tort law, testimonial privileges, and statutes.

#### A. Constitutional Privacy

The Supreme Court has characterized many of the privacy cases decided under the Constitution as protecting an “individual interest in avoiding disclosure of personal matters” – an interest that can fairly be restated as control over information about oneself. Several constitutional provisions have been invoked in the Court’s informational privacy decisions, with particular attention having been given to the First, Fourth, and Fifth Amendments.

The First Amendment has been held to protect privacy in the context of one’s associations. Under its decisions in this area, the Supreme Court has “repeatedly found that compelled disclosure [of political associations], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” For example, in *NAACP v. Alabama ex rel. Patterson*, the Court struck down an order requiring the local affiliate of the NAACP to disclose the names and addresses of its members, noting that “[i]nviability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association.” In a more recent case, the Court has

---

27. *Patterson*, 357 U.S. at 462.
further stated that “[t]he right to privacy in one’s political associations and beliefs will yield only to a ‘subordinating interest of the state [that is] compelling,’” 28 and even then “only if there is a ‘substantial relation between the information sought and [the] overriding and compelling state interest.’” 29

It is not clear from the Court’s decisions just how far the guarantee of privacy in one’s associations extends. Based on the language of the cases quoted above, it is apparent that the First Amendment protects privacy in political associations. The Court has also stated in dicta that for the purposes of constitutional analysis, “it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters,” 30 implying that other forms of association may be entitled to privacy protection as well. In any case, it appears to be well settled that an individual’s First Amendment right of association includes the right to control information about one’s associations at least in some circumstances, and that this right can be overridden only by a compelling countervailing state interest.

A more widely known source of constitutional privacy is the Fourth Amendment. In its guarantees against unreasonable searches and seizures, the Fourth Amendment protects individuals in their activities, conversations, and other affairs from government observation and recording; the amendment thus gives to individuals a right to control certain information about themselves. However, “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’” 31 Rather, it must be understood as protecting individuals’ “reasonable expectations” of privacy, with the reasonableness depending very heavily upon the context of the activity for which protection is sought.

The Supreme Court’s modern interpretation of the privacy protections afforded by the Fourth Amendment was introduced in *Katz v. United States.* 32 In that case, the FBI attached an electronic listening and recording device to a public telephone booth, and used the device to record the defendant’s end of conversations regarding illegal gambling activities. The defendant challenged the admissibility of the government’s recordings, claiming that a public phone booth was a “constitutionally protected area” 33 under the Fourth Amendment. The Court rejected the defendant’s formulation of the issue, noting that “the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase ‘constitutionally protected area.’” 34 What was key to resolution of the case at hand, said the Court, was that “the Fourth Amendment protects people, not places. What a person knowingly exposes to

---

29. Id. at 92 (quoting *Gibson*, 372 U.S. at 546).
32. Id.
33. Id. at 349.
34. Id. at 350.
the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.\textsuperscript{35}

Whether the FBI’s conduct violated the defendant’s right to privacy under the Fourth Amendment thus turned not on whether the government committed a physical trespass into a protected area, but on whether the defendant took steps that would entitle him justifiably to assume that his conversation would “not be broadcast to the world.”\textsuperscript{36} Importantly, the Court in \textit{Katz} also made clear that the Fourth Amendment protects individuals against more than the seizure of physical property or other tangible items; oral statements overheard in the absence of any technical trespass are protected as well.\textsuperscript{37}

In his \textit{Katz} concurrence, Justice Harlan described the inquiry under the Fourth Amendment as whether “a person has a constitutionally protected reasonable expectation of privacy.”\textsuperscript{38} Subsequent decisions of the Court have adopted and relied on the reasonable expectation of privacy analysis, but have not resulted in an especially broad range of protected activity or information. For example, the Court has held that there is no legitimate expectation of privacy in one’s bank records,\textsuperscript{39} in the phone numbers one has dialed,\textsuperscript{40} or in the contents of household garbage one has left on the curb for collection,\textsuperscript{41} noting that once an individual voluntarily conveys information to another, he cannot reasonably expect that the information will not later be shared with the government.\textsuperscript{42}

Protections for one’s privacy interests in the home, however, have been comparatively strong under the reasonable expectation of privacy test.\textsuperscript{43} Even after \textit{Katz}’s abandonment of the protected area standard, the Court has held that “the extent to which the Fourth Amendment protects people may depend

\textsuperscript{35} Id. at 351 (citations omitted).
\textsuperscript{36} Id. at 352.
\textsuperscript{37} Id. at 353 (citing Silverman v. United States, 365 U.S. 505, 511 (1961)).
\textsuperscript{38} Id. at 360 (Harlan, J., concurring).
\textsuperscript{40} Smith v. Maryland, 442 U.S. 735 (1979).
\textsuperscript{42} As Professors LaFave and Israel have observed, several objections can be raised to the Court’s analysis in these privacy cases. With respect to financial records, the conclusion that individuals do not have a reasonable expectation of privacy in documents submitted to a bank is highly questionable, given that banks have a legal obligation to keep their depositors’ transactions secret. Moreover, disclosure of financial information to banks or to telephone numbers to phone companies cannot be said to be completely voluntary, given the practical necessity of using banks and telephones in modern society. See Wayne R. LaFave and Jerold H. Israel, Criminal Procedure § 3.2, at 136 (2d ed. 1992). In the context of household garbage disposal, disclosure to third parties may be even less voluntary, as residents may be commanded by local ordinance to place their rubbish in the streets for collection. See California v. Greenwood, 486 U.S. at 55 (Brennan, J., dissenting).
\textsuperscript{43} See Katz v. United States, 389 U.S. at 351 n.5 (1967) (The special place given to privacy of the home is further supported by the rarely mentioned Third Amendment, which prohibits the peacetime quartering of soldiers in private houses without consent of the owners.).
upon where those people are," and that the capacity to claim the protection of the amendment depends upon whether a person “has a legitimate expectation of privacy in the invaded place.” And according to the Court, of all the settings in which the Fourth Amendment protects the individual’s privacy, “[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home.” Thus, however variable or contextually dependent the Fourth Amendment right to privacy may be in other settings, the right to some degree of control over information about what occurs in one’s own space seems secure in the post-
Katz era.

A third constitutional provision that has been extensively discussed in the Court’s privacy cases is the Fifth Amendment. In its guarantee that “no person . . . shall be compelled in any criminal case to be a witness against himself,” the amendment would seem on its face to give individuals the right to control information about themselves in certain contexts, and to deny the government the right to extract that information from them. However, the extent to which the Fifth Amendment has actually been interpreted to protect informational privacy is somewhat limited. The Court has consistently held that the amendment stops well short of protecting an individual from all compelled disclosure of personal information in the context of a criminal case; the threat of criminal prosecution must also be present if its privileges are to apply. In other words, as long as the government guarantees immunity from any prosecutions based on the self-incriminating information sought, it can require a person to reveal almost anything about herself without violating the Fifth Amendment.

Because the government can compel an individual to reveal personal information simply by providing prosecutorial immunity, it would be easy to conclude that the Fifth Amendment does not in fact protect privacy. But even in the course of limiting the applicability of the amendment to situations of compelled testimonial self-incrimination, the Court has acknowledged that the amendment “truly serves privacy interests” within certain bounds. That is, the mere fact that the privacy guarantees of the Fifth Amendment are context-dependent does not mean that the amendment does not significantly protect

45. Id. (emphasis added).
47. The protection given to the home under the Fourth Amendment is of course not absolute. The police may, for example, search or observe an individual in his home once a warrant to do so has been duly issued.
48. U.S. CONST. amend. V.
49. See, e.g., Ullman v. United States, 350 U.S. 422 (1956) (holding that an individual could be forced to testify once immunity from criminal prosecution had been granted, even though other penalties (such as ineligibility for federal employment and disqualification for passport) might follow as a result of his compelled admissions).
privacy; even though the amendment does not give individuals absolute title to control over personal information, it does give them the right to control that information precisely when they may need it most — such as when they are threatened with a loss of their liberty or property at the hands of the government.

Indeed, in the circumstances in which it operates, the Fifth Amendment protects privacy in several important ways. We have already observed that the amendment gives a person the right not to disclose information about his involvement in a crime as long as he faces the threat of prosecution. In many cases, such as when a person is the lone suspect in a single-actor offense, this right can effectively amount to one of absolute control over the relevant personal information.51 The Fifth Amendment further serves privacy interests by protecting individuals against forced acts of self-condemnation — not against “the bare recital of facts about the crime,” but against “the admission of wrongdoing [and] the revelation of remorse.”52 According to Robert Gerstein, it is arguably this forced “mea culpa, the public admission of private judgment of self-condemnation, that seems to be of real concern” in the privilege against self-incrimination.53 Hence, even if the scope of the Fifth Amendment is limited to protecting against forced admissions of guilt and submissions to punishment, the amendment plays an important role in protecting the privacy of the individual’s conscience.

As this analysis of Supreme Court decisions and doctrine has shown, the Constitution protects and serves informational privacy interests to a significant degree. The First Amendment serves privacy by shielding one’s political associations against compelled disclosure. The Fourth Amendment protects reasonable expectations of privacy by guaranteeing individuals that they will not be subject to unreasonable searches and seizures. The Fifth Amendment serves privacy by allowing persons to refuse to reveal information about themselves if they are in danger of criminal prosecution. Neither when taken independently nor when considered as a whole do these provisions amount to a general right to privacy; all of the Constitution’s privacy protections are applicable only in certain settings. Nevertheless, the constitutional decisions of the Supreme Court undeniably demonstrate recognition of the importance of personal control over information in our society. The broader protections available in other areas of the law — common law torts, testimonial privileges, and statutes — are further evidence of a strong societal commitment to a right to privacy, and are reviewed below.

51. In such a situation, the government has no incentive to offer the defendant immunity, and there is no one other than the defendant who knows what the defendant’s involvement in the crime may have been. The defendant thus has total control over the relevant information and cannot be forced to relinquish that control.
53. Id. at 91.
B. Tort Privacy

When Warren and Brandeis advanced their case for an explicit recognition of a right to privacy, they built their argument on the idea that “[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others”\(^{54}\) — in essence, the right to control certain information about oneself. This right was based “not [on] the principle of private property, but that of an inviolate personality.”\(^{55}\) Warren and Brandeis thus believed that the right to privacy was closely related to one’s dignity and identity, and consequently should be protected under law. In all cases in which this right was invaded, an action for damages in tort was called for.\(^{56}\)

In the years following the Warren and Brandeis article, the common law of torts did indeed come to protect privacy and provide remedies for its breach. By 1960, Dean Prosser was able to report that the “overwhelming majority” of states had recognized the right to privacy in some form,\(^{57}\) with only four states having rejected it outright.\(^{58}\) Prosser characterized the various cases decided under the name of “privacy” as involving several distinct categories of injury; among these categories were “intrusion upon a plaintiff’s seclusion . . . or into his private affairs,” and “public disclosure of embarrassing private facts about a plaintiff.”\(^{59}\) The Restatement of Torts has since adopted Prosser’s basic framework, stating that (among other ways) “[t]he right of privacy is invaded by unreasonable intrusion upon the seclusion of another,” or by “unreasonable publicity given to the other’s private life.”\(^{60}\)

As they are formulated in the Restatement, the privacy torts reflect a strong concern for a person’s right to control information about herself. Under the intrusion tort, it is a sufficient basis for liability that one’s space or affairs has been invaded physically or through sensory observation; publicity need not be given to what the intruder observes,\(^{61}\) and no other use need be made of any information obtained about the plaintiff.\(^{62}\) Thus, the mere fact that a single individual has made himself aware of personal information about another through unwelcome means constitutes a legal injury. A separate legal injury arises in cases where an individual makes the public aware of the personal affairs of another, provided that the publicized information “is of a kind that would be highly offensive to a reasonable person, and is not of legitimate concern to the public.”\(^{63}\) The injury in publicity cases is distinct from the

\(^{54}\) Warren & Brandeis, supra note 25, at 198.
\(^{55}\) Id. at 205.
\(^{56}\) Id. at 219.
\(^{58}\) Id. at 388.
\(^{59}\) Id. at 389.
\(^{60}\) RESTATEMENT (SECOND) OF TORTS § 652A (1977).
\(^{61}\) § 652B cmt. a.
\(^{62}\) Id. at cmt. b.
\(^{63}\) § 652D.
means by which personal information is obtained, and is constituted solely by
the fact that the information is made widely known. Accordingly, liability
under this tort may arise even if there has been no violation of the separate
intrusion tort.54

When combined with the protections of the Constitution, the privacy
protections at common law give persons significant rights of control over
information about themselves. The Constitution guarantees against
interference with privacy by the government, while the common law of torts
safeguards against invasions of privacy by individuals. Taken together, these
protections speak convincingly to society’s recognition of the role of privacy in
a person’s sense of liberty and dignity.

C. Testimonial Privileges

The law of testimonial privileges further demonstrates society’s
commitment to protecting a person’s right to a certain amount of control over
her personal information. Despite the fact that under our system of justice “the
public has a right to every man’s evidence,”65 and although the vast majority
of our evidentiary rules have discovery of truth as their justification,
testimonial privileges such as priest-penitent, husband-wife, and attorney-client
are well-established features of our justice system. These privileges, like the
constitutionally-based privilege against self-incrimination, undoubtedly
operate to exclude relevant and non-prejudicial information from evidence for
reasons that are in no way related to the search for truth.

The traditional justification for testimonial privileges is that they are
necessary to protect socially desirable relationships, such as the relationship
between a doctor and his patient, a lawyer and his client, or a clergyman and
his penitent.66 It is urged that these relationships cannot be effective without
open communication, and that open communication cannot take place unless
the participants are given some degree of control over the information that they
communicate. This utilitarian justification places primary value on the
functioning of the relationship rather than on the privacy of the information
shared. At the same time, however, the argument recognizes and supports the
idea that many important relationships depend upon privacy if they are to be
fully realized.

A related, but distinct, justification for testimonial privileges can also be
offered. Under this theory, the privacy of communications is not protected
because of any actual effect that privacy may have on conduct within
relationships; the focus is rather on the value of privacy in relationships per se.
However, it should be noted that this is a theory of “comparatively recent

64. See id. at cmt. a.
66. See JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE § 72 (4th ed. 1992)
(The authors attribute this justification to Wigmore, and note that Wigmore’s views have “largely
conditioned the development of thinking about privilege.”).
origin,” and as such “probably has not operated as a conscious basis for either the judicial or legislative creation of existing privileges.” Nevertheless, a rejection of this theory in favor of the utilitarian theory as the true justification for privileges is not a rejection of the value of privacy. While the non-utilitarian theory regards control over information as an important end, the utilitarian theory regards such control as an essential means. Both theories place a high value on privacy in certain relationships, and protect control over information even at the expense of truth.

D. Statutory Privacy

A final source of legal protection for informational privacy is statutory law. At the federal level, numerous statutes recognizing and safeguarding the right to privacy have been enacted. The first comprehensive statute of this kind was the Privacy Act of 1974, involving personal information gathered and maintained by the federal government. In considering the act, Congress found that “the right to privacy is a personal and fundamental right protected by the Constitution of the United States,” and that “in order to protect the privacy of individuals . . . it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by [federal] agencies.” Subsequently, Congress has passed a wide range of privacy legislation, protecting privacy in such diverse fields as electronic eavesdropping, financial records, information in the possession of newspapers, and video rental records. Many states have enacted similar laws protecting informational privacy in various areas. Though many of these federal and state statutes do not give to individuals a direct right to control information about themselves, they all seek to limit the extent to which personal information can be disclosed to parties with whom individuals have not chosen to share it.

This section has demonstrated that the various branches of the law recognize and protect a right to informational privacy in a number of forms. The Constitution protects privacy in the context of associations, in the context of searches and seizures of persons and their homes, and in the context of

67. Id.
69. 5 U.S.C.A. § 552a (West 2008).
70. For a discussion of many of the federal privacy laws, see Turkington, supra note 70.
compelled testimonial self-incrimination. The common law of torts protects an individual’s right to control information about himself by providing remedies for intrusion into his seclusion and for publicizing information about his personal affairs. Testimonial privileges give a person a high degree of control over information shared within certain relationships, even against the needs of the justice system to discover the truth in all proceedings. Lastly, federal and state statutes protect privacy of personal information by guarding against its disclosure to unintended recipients.

To be sure, these many legal protections of informational privacy have their limitations. As Professor Gavison has argued, “[i]n many cases, the law cannot compensate for losses of privacy, and it has strong commitments to other ideals that must sometimes override the concern for privacy. Consequently, one cannot assume that court decisions protecting privacy reflect fully or adequately the perceived need for privacy in our lives.” Despite its limits, however, the law clearly reflects a societal commitment to the idea that some control over personal information is essential to human relationships, freedom, dignity, and autonomy. This is not to suggest that the law protects all information that one wishes to keep private; legal protection depends on a variety of factors, including the character of the information, the means by which it is obtained, and the ends that are served by granting to or withholding from an individual the right to control its dissemination. In order to evaluate the main question of this paper—namely, the strength of the President’s claim to a private sphere—we must therefore proceed to consider our privacy arguments in the particular context of his high office.

IV. PRIVACY AND THE PRESIDENCY

So far this analysis has shown that privacy as control over personal information is extremely important to the creation and maintenance of the kinds of relationships that are vital to human flourishing. The discussion has also demonstrated that privacy promotes autonomy, preserves liberty, and aids democracy. In addition, the analysis has shown that the law in many forms and in many contexts has recognized the importance of privacy, having granted individuals significant rights to control certain information about themselves.

Given this demonstrated importance of privacy in morals and law, it would appear that the President, like every other individual, has a very strong claim to some control over information about himself and his relationships with others. However, it is abundantly clear that the President is in many respects quite unlike every other individual. Perhaps most importantly, he occupies, through his own choices and efforts, the extremely visible position of leader of the world’s most powerful nation; it is only to be expected that such a figure would command the interest and attention of the global public. In choosing such a public life, how much privacy should the President justly be

76. Gavison, supra note 19, at 456-57.
One possible argument is that in seeking the presidency, a person gives up all rights to control information about himself. Richard Posner, for example, has suggested that an individual should not have the right to conceal any personal information that might be relevant to social or political interactions with others; “each of us should be allowed to protect ourselves . . . by ferreting out concealed facts about other individuals that are material to their implicit or explicit self-representations.” Posner illustrates his point by analogizing to the world of commerce:

We think it wrong (and inefficient) that a seller in hawking his wares should be permitted to make false or incomplete representations as to their quality. But people ‘sell’ themselves as well as their goods. A person professes high standards of behavior in order to induce others to engage in social or business dealings with him from which he derives an advantage, but at the same time conceals some of the facts that the people with whom he deals need in order to form an accurate picture of his character.

Under Posner’s theory, it could be asserted that any information about the President that might shed light on his leadership, integrity, or character should be made available to the public. Obviously, such a standard would deprive the President of control over a great deal of information that most people consider private and personal; details about his personal interactions, his spiritual life, or the substance of his most intimate conversations could all be considered relevant to the full picture of the President as a person. If all of this information were available to the public on demand, a right to privacy as we have defined it would clearly not belong to the President in any meaningful way.

Support for the idea that a president gives up some rights to privacy as a result of his public office can also be found in Supreme Court decisions. In the famous case New York Times v. Sullivan, the Court held that under the First Amendment a public official could not recover damages “for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice,’ that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” In so doing, the Court emphasized that “debate on public issues should be uninhibited, robust, and wide-open.” The Court further noted that such debate “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,” for “public men are, as it were, public property.”

78. Id. at 22.
80. Id. at 270.
81. Id.
It is apparent from the Court’s opinion in *Sullivan* that an individual such as the President, who has achieved the status of an elected public official, loses some right to control the dissemination of even false information about himself. Subsequent Supreme Court decisions have further established that a public figure’s diminished right of control over information is not limited to information relating to his official acts and decisions. In *Time, Inc. v. Hill*, for example, the Court extended the *Sullivan* standard to include false reports of all matters of public interest. The Court observed that “[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs” alone, for “[f]reedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” Moreover, the Court explained that “[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community,” and “[t]he risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech.” In the *Hill* case, these standards led the Court to deny damages to a private citizen for the negligent publication of a false report of a highly visible episode in his life; even for a private individual, the right to control personal information was held to be diminished when that information was of public interest. For an extremely public individual like the President – about whose life most information is of public interest – it would therefore seem to follow that the right to control discussion and comment on personal information is very limited indeed.

However, neither Posner’s economic theory of privacy nor the Supreme Court’s decisions support the notion that the President has no significant rights to control information about himself. Beginning with Posner’s argument, even if one were to accept that information relevant to an assessment of one’s character, integrity, or leadership is valuable and desirable, it would not follow that any course taken to uncover such information should be considered legitimate. Posner himself acknowledges this point: he concedes that if information were obtained through widespread eavesdropping or electronic surveillance, then people would be far more careful and guarded with their speech. The result would be less effective communication of information – an undesirable social cost. In the case of the presidency, the costs of

---

82. *Id.* at 268 (quoting *Beauharnais v. Illinois*, 343 U.S. 250, 263-64 (1952)).
83. 385 U.S. 374 (1967).
84. *Id.* at 388.
85. *Id.* at 388 (quoting *Thornhill v. State of Alabama*, 310 U.S. 88 (1940)).
86. *Id.* at 388.
87. *Id.* (Mr. Hill and his family had been held hostage in their home by three escaped convicts. Though the Hills tried to avoid publicity after the ordeal ended, their experience received wide attention in the press and inspired a novel and a play. *Life* magazine allegedly reviewed the play in such a manner as to give the impression that the play accurately depicted the Hills’ experience, when in fact had included acts of violence and abuse that never took place.)
89. *Id.*
inhibited or decreased communication would be especially undesirable, as so much of the effective functioning of the executive branch of government depends upon open and frank exchange of ideas. Thus, even under Posner’s theory, while the President may not have a right to object to the use of information that is publicly known about him, he may nevertheless have a right to object to the means by which that information becomes publicly known in the first place.

As to Supreme Court decisions, neither Sullivan nor Hill conflicts with the claim that a public figure such as the President has a right to keep certain information about himself out of the public domain. It is significant that neither case dealt with an attempt by an individual to keep information about himself private at all; both cases involved objections to the use and portrayal of information that was already widely available. In addition, both the Sullivan and Hill cases called on the Court to balance tort-based privacy claims against defenses rooted in freedoms of speech and press. Under these circumstances, it should not be surprising that the Court chose not to protect non-constitutional privacy interests at the expense of First Amendment guarantees.

But the case of a president seeking to prevent the disclosure of personal information that is not generally available would present a very different situation. Such a case would not involve a tort-based libel or false publicity claim urged against freedoms of the press, but a possibly constitutionally-based privacy right asserted against intrusions by the government. Under these circumstances, the Court could easily hold that a public figure like the President has some right to control over personal information, and remain fully in line with its Sullivan and Hill precedents.

The Supreme Court has in fact come close to issuing just such a holding. Specifically, in Nixon v. Administrator of General Services, the Court acknowledged that notwithstanding his public status, the President “has a legitimate expectation of privacy in his personal communications.” Though it did not so hold directly, the Court suggested that these expectations of privacy are of a constitutional dimension; indeed, the majority was willing to agree that “at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity.” In other words, the Supreme Court accepted that even the President has some rights to control information about himself.

In the Nixon case, the President attempted to invoke these privacy rights to attack a Congressional act that authorized the confiscation of papers and

---

91. At this point, the analysis is concerned with the broad question of whether the President has any legitimate expectations of control over personal information. A later section will discuss the narrower question of whether and to what extent the presence of Secret Service agents should affect those expectations.
93. Id. at 457.
recordings documenting many of his conversations and associations while in office. The Court upheld the facial validity of the act, but only after emphasizing the act’s many provisions designed to minimize intrusion into the President’s legitimate expectations of privacy, and directing the government to “promptly disclaim any interest in materials conceded to be [the President’s] purely private communications and deliver them to him.”94 The Court further sustained the Congressional act against the President’s First Amendment privacy in association claim. Again, however, the Court did so only after acknowledging that a legitimate First Amendment privacy interest was indeed at stake, and that the act was designed to protect that interest as far as possible under existing circumstances.95

Supreme Court precedent thus lends considerable weight to the argument that the President has not only a strong moral claim to a right to privacy, but also a strong legal claim. We may now begin to look at the question of whether these legal privacy interests are of a nature and strength to support a presidential privilege against Secret Service disclosure of personal information observed in the course of its protective duties. The Nixon case in particular suggests that the answer to this question is yes.

As discussed above, the Nixon Court made the important observation that the President has legitimate expectations of privacy against disclosure of some personal information. The Court cited Katz v. United States96 for this proposition, indicating that the President’s privacy expectations are based in the Fourth Amendment of the Constitution.97 The Court also assumed that these privacy expectations were implicated by the Congressional act at issue, even though the act did not present a paradigmatic Fourth Amendment search and seizure.98 The fact that the act represented the first attempt by Congress to divest a President of control over his own papers and recordings did not have significant bearing on the question of the legitimacy of the President’s expectations of privacy; that is, the fact that the Nixon case involved an unexpected change in settled procedures did not appear to be a dispositive issue in the Court’s privacy analysis.99 Rather, the focus of the Court’s analysis was on the nature of the communications sought to be protected, the

94. Id. at 464, 484.
95. Id. at 467.
98. Id. at 462.
99. The Court gave no indication, for example, that future Presidents would have no legitimate expectations of privacy in their personal communications simply because they would now be on notice that Congress could pass an act confiscating their papers and recordings. But even if a change in settled practice were a key factor in evaluating a President’s expectations of privacy, at least President Clinton would have had a strong privacy claim against Secret Service testimony, as there had never before been any hint that agents could be called to testify about a President’s personal activities. See In re Sealed Case, 148 F.3d 1073, 1076 (D.C. Cir. 1998) (stating that Independent Counsel Kenneth Starr’s attempt to compel Secret Service testimony “appears to be the first effort in U.S. history to compel testimony by agents guarding the President.”)
procedures by which the materials were screened, and the interest of the public in maintaining a record of the President’s terms in office.

Applying these features of the Nixon case to the case of Secret Service testimony about the President’s private affairs, it would appear that the argument for a presidential privilege against such testimony is of some force. Especially after the Nixon case, Presidents clearly have a legitimate expectation of control over personal information; after all, the Nixon majority explicitly stated (though it did not technically hold) that the President has a constitutional right to keep certain communications and records private. Given that the President has this right, and given the unique threat that unrestrained Secret Service testimony would pose to this right, it would seem to follow that the President has a legitimate claim to prevent Secret Service testimony in at least some circumstances. However, the Nixon Court also stated that a President’s right to control private information has to be considered in light of the means by which the private information is obtained and any public interests at stake in invading the President’s private sphere. Thus, full consideration of the President’s right to privacy and the threats thereto posed by Secret Service testimony demands that we also consider additional factors. To this end, we will now examine more closely the nature of the relationship between the President and the Secret Service, along with the public interests that are involved in Secret Service protection for and testimony about the President.

V. THE PRESIDENT AND THE SECRET SERVICE

It is obvious that the President of the United States is an extremely important figure who should be protected from potential harm. History demonstrates that one form of potential harm from which the President needs to be protected is physical attack from would-be assassins and other violent individuals. The Secret Service provides this protective function, in part by providing the President with a detail of guards that remains in constant, close proximity to his person.

The President has, of course, a strong personal interest in allowing the Secret Service to maintain his physical safety. Beyond this personal interest, however, the President also has a legal obligation to allow the Secret Service to protect him; the United States Code provision that authorizes the Secret Service to protect the President does not authorize the President to decline protection, and indeed provides for fines and imprisonment of anyone who “knowingly and willfully obstructs, resists, or interferes with a Federal law enforcement agent engaged in the performance of the protective functions.”

Hence, even if the President wished to distance himself from his protective detail in order to secure some purely private time, he could not do so without risking criminal penalties.

100. 18 U.S.C.A. § 3056 (West 2008). See also In re Sealed Case, 148 F.3d 1073, 1077 (noting that just as the Secret Service has a duty to protect the President, “the President has a correlative duty to accept protection.”).
The degree of potential invasiveness of the Secret Service into the President’s private sphere is substantial. According to the United States Court of Appeals for the D.C. Circuit, “the Secret Service uses protective techniques the effectiveness of which depends upon close physical proximity to the President.” In the words of the Director of the Secret Service, “it is no exaggeration to say that the difference of even a few feet between a President and his protective detail could mean the difference between life or death.”

Given this emphasis on protective techniques that focus on close proximity to the President, it is reasonable to assume that Secret Service agents are often (if not usually) in positions where they are likely to overhear and observe a tremendous amount of interaction between the President and others that is personal and private in nature.

The Secret Service has itself recognized that its agents are in a unique position to threaten the privacy of the President, and has sought to prevent its agents from being compelled to testify about what they observe in the course of their duties. During the Independent Counsel investigation of President Clinton in 1998, Kenneth Starr sought testimony before his grand jury from members of the President’s protective detail; in response, the Secret Service attempted to assert a “protective function privilege” which would “absolutely protect[] information obtained by Secret Service personnel while performing their protective function in physical proximity to the President.”

The only proposed limitation to the privilege was that it 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.”

The Secret Service asserted that the proposed privilege was necessary if its agents were to perform their protective duties effectively. The Service “has a tradition of maintaining the confidence of its protectees,” and was “concerned that if any President of the United States were given reason to doubt the confidentiality of actions or conversations taken in sight or hearing of Secret Service personnel, he would seek to push the protective envelope away, or eliminate some of its components, undermining it to the point where it could no longer be fully effective.”

In support of its position, the Secret Service offered a letter from former President Bush stating that what was at stake was “the confidence of the President in the discretion of the [United States Secret Service]. If that confidence evaporates the agents, denied proximity, cannot properly protect the President.” Implicit in these

102. Id.
103. Id.
104. Id.
105. Id.
107. Id.
arguments is the idea that when mandatory protection is combined with the possibility of testimony, an invasion of privacy occurs that any person — despite his self-interest in personal safety — would seek to avoid.

These arguments notwithstanding, the Court of Appeals rejected the Secret Service’s claim to a protective function privilege. The court reasoned that the asserted privilege was to be recognized under Rule 501 of the Federal Rules of Evidence (if it was to be recognized at all), and that the Secret Service was therefore required to “demonstrate with a high degree of clarity and certainty that the proposed privilege will effectively advance a public good.” 108 Under this standard, the court found that the Service was not able to demonstrate with sufficient clarity both the need for and the efficacy of the protective function privilege.

In particular, the court was not convinced that the absence of the privilege would seriously impair the Secret Service’s ability to protect the President effectively. The court noted that the President was legally required to accept protection whether he liked it or not, and that he also had a “profound personal interest” in being well-guarded. 109 The court also believed that the privilege as asserted had enough exceptions that the President might still be inclined to attempt to distance himself from his agents; the proposed felony exception, for example, was such that the President would not be able to be certain whether his agents knew that they were observing the commission of a felony, which would require him to discount the value of the privilege substantially. 110

The court found the privilege to be further weakened by the fact that it would be vested not in the President but in the Secretary of the Treasury, the cabinet officer who oversees the Secret Service. The court observed that it seemed doubtful that a privilege vested in someone other than the President would be likely to influence the President’s conduct, for the President would be unable to control whether the privilege was invoked or waived. 111 And, said the court, even if the President were able to control the invocation of the privilege indirectly through the Secretary of the Treasury, that control would end when the President left office. As a result, there would always be the possibility that the Secret Service would disclose private facts after the President’s term of service ended — a threat that could lead the President to avoid his protectors just as much as the threat of disclosure while he remained in office. 112

Despite the fact that the Court of Appeals rejected the Secret Service’s proposed protective function privilege, 113 it remains the case that the courts

108. Id. at 1076 (citing United States v. Gillock, 445 U.S. 360, 375 (1980)).
109. Id. at 1077.
110. Id.
111. Id.
112. In re Sealed Case, 148 F.3d 1073, 1078.
113. The arguments advanced by the Court of Appeals in rejecting the protective function privilege have not been left uncriticized. Professor Amar, for example, has noted that while the court found the proposed felony exception “strange” and apt to undermine the President’s
have said nothing about a privacy based privilege against Secret Service testimony vested in the President himself.\textsuperscript{114} A privilege of this sort would be different in significant respects from the privilege rejected by the Court of Appeals. It would be designed not to enhance the Service’s ability to protect the President, but to protect the constitutional rights of the President to control certain personal information; it would also be the President’s privilege to invoke or waive, and would thus endure after the President left office. As for the details of this privilege — its sources, its limits, and its administration—-I consider these below.

\textbf{VI. THE PRESIDENT’S PRIVACY PRIVILEGE}

Drawing upon the foregoing analysis of the moral and legal dimensions of privacy, I will now propose and outline a limited privilege that would serve the President’s interests in privacy without unduly compromising the public’s interests in presidential safety or in the proper administration of justice. This privilege would presumptively preclude Secret Service testimony about all personal conversations and associations that, despite the President’s desire to keep them private, agents overhear or witness in the course of their protective duties. As suggested previously, this privilege would be vested in the President personally, rather than in Secret Service agents or their directors, and would endure beyond the President’s incumbency. As also noted above, the primary purpose of the privilege would be to protect the President’s privacy, rather than to advance the protective functions of the Secret Service or to promote the interests of other third parties.

What would be the legal foundation for such a privilege? Several possibilities can be found in the Constitution. Perhaps most plausibly, the Fourth Amendment’s protections of legitimate expectations of privacy could be construed to apply in this context. As a starting point, the opinion in \textit{Nixon v. Administrator of General Services} clearly states that the President has legitimate expectations of privacy in his personal communications, and that these expectations are at least partially based in the Fourth Amendment. In addition, the Fourth Amendment argument is strengthened by the fact that the White House is the President’s home. We have seen that even after the abandonment in \textit{Katz} of the protected area standard, the Supreme Court has held that of all the settings in which the Fourth Amendment protects an individual’s privacy, “[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home.”\textsuperscript{115} The President should accordingly have a clearly

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{114} The need to protect privacy as such was not offered as a basis for the Secret Service’s proposed privilege, and so the Court of Appeals engaged in no discussion of the merits of a privacy-based claim.
\item \textsuperscript{115} Payton v. New York, 445 U.S. 573, 589 (1980).
\end{itemize}
\end{footnotesize}
defined expectation of privacy under the Fourth Amendment, at least while in the White House.

But even if it is conceded that the protections of the Fourth Amendment apply to the President in his home, it must still be shown that Secret Service protection and testimony implicates those particular protections. An obvious reason to object that the Fourth Amendment is not implicated in the Secret Service context is that no typical search and seizure is involved. However, the Supreme Court in *Nixon* accepted that the President had a legitimate expectation of privacy in his personal communications and gave no indication that the Fourth Amendment was inapplicable to the case, despite the fact that the Congressional act at issue “could not be analogized to a general search.”

Rather than holding that the Fourth Amendment was not implicated because the case did not present a paradigmatic search and seizure, the Court merely held that the act was sufficiently respectful of the President’s privacy interests as not to run afoul of his Fourth Amendment rights to control over personal information.

It would therefore appear that the Fourth Amendment may be invoked against some governmental invasions into the President’s privacy, even if they are not in the form of a standard search and seizure. Following the *Nixon* case, Secret Service surveillance and testimony might well qualify as one such invasion that is entitled to Fourth Amendment scrutiny and protection. While the President’s protective detail is not in place for the purposes of discovering information, his bodyguards are federal agents who monitor his every move under authority of law, and who may be tapped by the government at will as a source of private information about the President. The potential degree of intrusion into the President’s legitimate expectations of privacy presented by Secret Service testimony would thus seem to be far greater than that presented by the act in *Nixon*, where any invasion was “undertaken with the sole purpose of separating private materials to be returned to [the President] from non-private materials to be retained and preserved by the Government.” Hence, if the same analysis applied by the Court in *Nixon* is applied in the context of Secret Service testimony, the greater threat to the President’s privacy could very well compel the recognition of a presidential right to prohibit his agents from disclosing personal information in legal proceedings.

Under a Fourth Amendment justification, the extent to which the President seeks to keep his personal interactions from being witnessed would be relevant to an analysis of the legitimacy of his expectations of privacy. The Supreme Court has stated that “what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” In *Nixon*, the Court invoked the knowing exposure standard in

117. See id. at 465.
118. Id. at 462.
finding that the President could not “assert any privacy claim as to the
documents and tape recordings that he has already disclosed to the public.”120
Together, these statements by the Court raise the question of whether
interactions that the President has with others when he knows the Secret
Service is in a position to witness them must be regarded as having been
knowingly exposed to the public.

The nature of the legal relationship between the President and the Secret
Service is such that communications and interactions that the President has
with others should be protected, despite the President’s knowledge that his
agents might overhear them. In most cases, a knowing exposure of personal
information to others implies a willing exposure; once information has been
willingly exposed, it is difficult to maintain a claim that the information must
be kept private. But as discussed earlier, the President is legally obliged not to
interfere with the Secret Service’s efforts to protect him. As a result, though
he may know that he is exposing his interactions to the Secret Service, he may
also be legally unable to do very much to avoid doing so. Under these
circumstances, knowledge of exposure clearly cannot be equated with intent to
expose, and so the argument for denying recognition of a legitimate
expectation of privacy in these interactions is weakened.

Cases such as United States v. Miller,121 Smith v. Maryland,122 and
California v. Greenwood123 do not substantially undermine the strength of the
claim for protecting the privacy of the President’s interactions despite exposure
of those interactions to Secret Service agents. In those cases, the Court held
that individuals had no legitimate expectations of privacy in financial
documents submitted to banks, telephone numbers dialed through phone
companies, or household rubbish left on the curb for collection since those
items had all been knowingly exposed to third parties; the fact that the
exposure may not have been as a practical matter purely voluntary did not
affect the analysis in any meaningful way. However, none of those cases
involved a degree of privacy invasion even remotely similar to that posed by
the Secret Service’s constant physical proximity to the President. As discussed
previously, Secret Service agents are in a position to intercept far more than
the President’s business transactions, telephone calls, or personal garbage;
indeed, agents are in a position to intercept the substance of even the most
personal of interactions between the President and his family in the President’s
own home. Moreover, in no other case has the lack of voluntariness been quite
so stark – for in no other case has an individual been required to submit to third
party observation of every facet of his life by command of federal law.124

120. Nixon, 433 U.S. at 459.
124. It is obviously true that in one sense no one is required to submit to the invasive
presence of Secret Service agents, for no one is required to accept the presidency. However, the
idea that by voluntarily accepting the presidency an individual voluntarily abandons all rights to
It might not always be the case, of course, that the President exposes his personal interactions to the Secret Service because of a legal inability to do otherwise—in times, he simply may be indifferent toward the presence of his bodyguards. At other times, however, the President may seek to insulate himself from Secret Service observation as much as possible, either by communicating a desire for privacy directly to his agents or by putting a closed door between himself and his protectors. At least when the President takes such steps, his expectations of privacy should be held most legitimate, and should be protected under the Fourth Amendment.\textsuperscript{125}

A second possible constitutional source of a presidential privacy privilege is the First Amendment. A privilege based in the First Amendment might be narrower than one based in the Fourth Amendment, as the privacy protections of the First Amendment have been directly invoked primarily in the context of political associations.\textsuperscript{126} Still, many of the conversations that a President would wish to keep private are likely to be of a political nature, and so a privilege protecting privacy in political associations would be of considerable value.

The Supreme Court’s analysis in the \textit{Nixon} case supports the idea that the First Amendment is a legitimate foundation for a presidential privacy claim. The Court freely granted that “[i]t is, of course, true that involvement in partisan politics is closely protected by the First Amendment . . . and that ‘compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.’”\textsuperscript{127} However, the Court also noted that “a compelling public need that cannot be met in a less restrictive way will override”\textsuperscript{128} First Amendment privacy interests. The Court ultimately held against President Nixon on his First Amendment claim, emphasizing both the compelling public interest in maintaining a record of the President’s public materials and the minimal invasion into the President’s privacy interests that would occur under “the Act’s terms protecting [him] from improper public disclosures and guaranteeing him full judicial review before any public access is permitted.”\textsuperscript{129}

The Court in \textit{Nixon} thus recognized a right of First Amendment privacy control over personal information is intuitively unattractive. In addition, the Supreme Court has plainly stated that the President retains a legitimate expectation of privacy in his personal communications, his public status notwithstanding. \textit{See Nixon}, 433 U.S. at 465.

\textsuperscript{125} This is not to suggest that the President should have no Fourth Amendment-based expectations of privacy when he has failed to take such steps; the suggestion is merely that the case for recognizing the President’s legitimate expectations of privacy is particularly strong when his desire for privacy is made unambiguous.


\textsuperscript{127} \textit{Nixon}, 433 U.S. at 467, (quoting \textit{Buckley}, 424 U.S. at 64).

\textsuperscript{128} \textit{Id}.

\textsuperscript{129} \textit{Id}.
for the President, but concluded that there was a compelling public need to separate the President’s public records from his private ones which could not be met in a less intrusive manner. In the context of Secret Service testimony, however, it is far from clear that there is a similarly compelling need to have access to testimony about the President’s private political associations, or that there is no less intrusive means of securing necessary information in legal proceedings. Consequently, the First Amendment privacy claim is much stronger in the context of Secret Service testimony than it was in the context of the *Nixon* case, and should be able to support a privilege covering at least political conversations and associations.

A third potential constitutional source of the President’s privacy privilege is the Due Process clause of the Fifth Amendment. The equivalent clause of the Fourteenth Amendment (different only in that it is applicable to the states rather than to the federal government) has frequently been interpreted to protect privacy. Generally, the privacy protections of the Due Process clause have focused more on rights to be free from government interference in personal decision-making than on rights to control personal information. But the Court has never held that the Due Process clause cannot encompass control over information issues, and has in fact applied Due Process analysis in a case involving an informational privacy claim.

If it is accepted that the Due Process clause applies to informational privacy claims, it would seem reasonable to recognize the presidential privilege as an aspect of liberty protected by the clause. The potential costs to the President’s personal privacy under existing rules are extreme, and there is a clear commitment under the Constitution to protecting individual privacy against government invasion. The Due Process clause does not, of course, encompass every claim that deals with personal information; in *Paul v. Davis*, for example, the Supreme Court held that the Due Process clause does not prohibit the state from disclosing records of official acts (such as arrests) simply because disclosure may result in damage to an individual’s reputation. However, unrestricted Secret Service testimony about the President’s personal associations and conversations invades privacy interests that are far more serious than an interest in reputation. We have seen that the President is legally obliged to allow the Secret Service to keep in constant proximity to him, and that as a result the President has no choice but to submit

---

130. The clause provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

131. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy includes right of married persons to use contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (right to privacy includes limited rights of women to have an abortion).

132. Whalen v. Roe, 429 U.S. 589 (1977). The Court held against the party asserting the privacy claim on the basis that there was no evidence to suggest that the personal information would be improperly disclosed, not on the basis that the Due Process clause did not cover informational privacy rights.


134. Id. at 713.
to government surveillance of every aspect of his life, both official and personal. If the President does not have some right to control the disclosure of what his bodyguards observe in the course of their protective duties, then he does not have the right to any meaningfully private interactions whatsoever. Such a result is a serious deprivation of the kind of liberty that most citizens are able to take for granted, and should be remediable under the Due Process clause.

Apart from the Constitution, the President’s privacy privilege might also be founded in evidentiary rules. The Supreme Court has allowed for the development of new privileges of this sort under the Federal Rules of Evidence, stating that the rules “did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to ‘continue the evolutionary development of testimonial privileges.’”[135] When considering a proposed new privilege, federal courts are to begin “with the primary assumption that there is a general duty to give what testimony one is capable of giving.”[136] Nevertheless, “exceptions 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.’”[137]

Following these standards outlined by the Supreme Court, the Court of Appeals in *In re: Sealed Case* held that recognition of the Secret Service’s protective function privilege would depend upon a clear and convincing showing that the privilege would advance the public good of presidential security. The court found that the proposed privilege failed this test; the fact that the President had a legal duty to accept protection, that the privilege was subject to somewhat vague exceptions, and that it would not be vested in the President personally all undermined the claim that the privilege would in fact “do anything to diminish the President’s incentive to keep his protectors at a distance.”[138]

By contrast, the presidential privilege urged here should not fail the Court’s tests for new testimonial privileges. The public good to be served by the privilege is not presidential security but presidential privacy. It is in the public’s interest to protect the President’s right to some control over personal information for several reasons. First, it is a public good to promote the ability of all citizens to establish and maintain the kinds of intimate relationships that are central to our idea of personhood. It is also a public good to respect the constitutional rights of every person to enjoy legitimate expectations of privacy, particularly in the home. Finally, it is a public good to protect the constitutional right of privacy that shields associations of a political nature from compelled disclosure. To allow unrestricted Secret Service testimony

---

137. *Id.* (quoting Trammel, 445 U.S. at 50).
about what they observe in the course of protecting the President would drastically undermine these public goods, while giving the President the right to some control over Secret Service testimony would directly advance them.

Recognition of the presidential privilege may also be necessary to protect the President’s rights to other well-established testimonial privileges, such as the spousal privilege, the attorney-client privilege, or the priest-penitent privilege. These privileges generally operate to protect only those communications that are kept within the confines of the confidential relationship; thus, the privileges may not apply when communications are intercepted by third parties, particularly when interception was reasonably to be anticipated. In the course of protecting the President, the Secret Service may frequently intercept communications of a generally privileged sort, and the President might reasonably expect this interception to occur despite his efforts to prevent it. Consequently, the President could lose the right to the protections of privileges that have long been held to be public goods. The loss of such basic privileges, along with the other costs associated with Secret Service testimony, would seriously demean the legal equality of the person occupying the office of President. Recognition of the proposed privilege could prevent this undesirable result, both by rendering the presence of Secret Service agents irrelevant to the confidential nature of otherwise privileged communications, and by preventing agents from themselves testifying about the substance of those communications.

A final potential source of a presidential privacy privilege is statutory law. As noted previously, Congress has in the past found that “the right to privacy is a personal and fundamental right protected by the Constitution of the United States” and has accordingly passed statutes regulating the collection, maintenance, use, and dissemination of a wide range of information about individuals. Indeed, we have seen that Congress has regarded privacy rights so highly that it has passed laws protecting even such seemingly unremarkable information as video rental records.

Given that Congress has assigned such fundamental importance to the right to privacy and has taken steps to protect personal information in other contexts, Congress should also take steps to protect personal information in the presidential context. A statutory privacy privilege would serve the “personal and fundamental right protected by the Constitution” that Congress has acknowledged privacy to be, and would shield against disclosure information that is arguably far more worthy of protection than much of what has been protected in the past.

Whatever the basis for the President’s privacy privilege, its nature and

139. See Strong, supra note 61, § 74.
140. 5 U.S.C.A. § 552a (West 2008).
141. For examples of the kinds of information that have been given Congressional protection, see Section III supra and statutes cited therein.
The interests to be served by the privilege have been discussed throughout this paper. These interests include protecting the right of the President to enjoy human intimacy by sharing personal information with friends, family, and other confidants without having that information disclosed to others. Additional interests include guarding the right of the President to engage in private (and perhaps controversial) political discussions without fear of the consequences that would follow from having them made public, and promoting the liberty of the President to act as he pleases in his home without worry about how the public would evaluate his personal habits and interactions. On the other hand, neither the public, the courts, nor Congress are likely to regard secrecy in unlawful activity as a “legitimate expectation” of privacy. Moreover, shielding unlawful activity from disclosure bears no relation to the moral and legal arguments advanced in support of the right to control over personal information.

Given these observations, it is clear that the presidential privacy privilege should not be absolute. The privilege should presumptively protect all lawful communications and associations observed by the Secret Service in the course of their protective duties, but should not protect information about criminal or other illegal activity. In addition, the privilege proposed here is primarily a testimonial one. That is, the privilege primarily aims to give the President the right to prevent Secret Service agents from testifying or otherwise giving evidence, either voluntarily or under subpoena, about the covered information in legal proceedings; it does not itself aim to prevent other forms of disclosure in non-legal fora. The privilege particularly targets testimonial disclosures because such disclosures can threaten legal interests as well as privacy interests, and because government attempts to compel testimony cannot be resisted by anything other than a strong legal right. By contrast, extra-legal disclosures (such as “tell-all” books or interviews) present more limited threats to the President’s interests, and can largely be addressed by confidentiality agreements or similar existing measures.

It remains to be considered how the proposed privilege is to be administered. I have noted that the privilege does not apply to information relating to criminal conduct. However, it will not always be apparent ex ante whether the activity or conversation about which information sought is criminal in nature or not. Moreover, information about non-criminal activity may nevertheless be directly relevant to a criminal investigation. How should

---

143. The presidential privacy privilege would not be unique among privileges and other privacy protections in failing to afford absolute coverage. Several common law privileges, such as husband-wife, attorney-client, and priest-penitent, do indeed provide near-absolute protection for shared information, including shared information about criminal activity. However, several constitutional privileges and safeguards are far from absolute; the executive privilege, the Fifth Amendment privilege against self-incrimination, and the Fourth Amendment protections against searches and seizures are all subject to important limitations. Executive privilege can be overcome in some cases upon a sufficient showing of need; the Fifth Amendment’s privilege does not apply unless there is threat of criminal prosecution; and the Fourth Amendment’s protections only extend to searches and seizures that are unreasonable.
these issues be addressed under the proposed privilege?

I suggest that the presidential privacy privilege be administered in a manner similar to the presumptive executive privilege accorded to official presidential communications. In United States v. Nixon, the Supreme Court recognized this presumptive privilege, finding it to be “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” However, the Court also stated that when the asserted executive privilege “is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process . . . [and] must yield to the demonstrated, specific need for evidence in a pending criminal trial.” Thus, while it was the duty of the District Court in the United States v. Nixon to treat subpoenaed records as presumptively privileged when the President refused to produce them, it was the subsequent duty of the court to order production for review in camera once the Special Prosecutor was able “to demonstrate that the Presidential material was essential to the justice of the [pending criminal] case.”

The standard set forth in United States v. Nixon speaks mainly of testing the presidential material at issue for admissibility and relevance—the same threshold that all other evidence in criminal cases must meet. Hence, it may be possible to read the case as creating a very weak privilege, one that can be overcome by no greater showing than would be required for non-privileged materials. But the Court’s opinion can also be read to create a much stronger privilege for presidential communications. As argued by Professor Tribe, “it is possible that, in indicating that the trial judge should demand a showing that the materials are ‘essential to the justice of the pending criminal case,’ the Court was suggesting that a rather stringent test be applied.” Since relevance, admissibility, and necessity must in any event be shown in order to require production of evidence prior to trial, the Court’s allusion to the trial judge’s special responsibility when the Executive refuses to comply with the subpoena may indicate that an even greater showing must be made to overcome the claim of privilege.

Moreover, any suggestion that the fair administration of justice should require disclosure of privileged information in most cases would not seem well founded; the same idea would point to the abolition of all evidentiary privileges, and “the Court has never intimated that the doctor-patient, attorney-client, or priest-penitent privileges are vulnerable because they occasionally prevent valuable evidence from getting into court.”

145. Id. at 708.
146. Id. at 713.
147. Id. (insertion in original).
149. Id.
150. Id.
This stronger interpretation of the standards that must be met to overcome a claim of executive privilege provides the best model for the standards that should be met to overcome a claim of privacy privilege. Like the separation of powers principles that support the executive privilege, the control-over-information principles that support the privacy privilege are based in the Constitution. In addition, both the executive privilege and the privacy privilege are concerned with preventing the negative consequences that would follow from the disclosure in legal proceedings of information shared between the President and others. Thus, the executive privilege and the privacy privilege have comparable foundations and serve comparable goals; they should therefore provide comparable procedural safeguards.

Following the strong executive privilege model, the privacy privilege should presumptively permit the President to prevent testimony by Secret Service agents about all conversations and associations that they witness in the course of their protective duties. Upon a preliminary showing by the party seeking disclosure that Secret Service agents can provide testimony that is relevant, admissible, and essential to a pending case, the presiding judge should conduct an in camera interview of the agents to determine whether they can in fact provide such testimony.\textsuperscript{151} If the judge is satisfied that the agents can provide information that is relevant, admissible, and essential, then she may require the agents to testify subject to significant limitations. In criminal cases, agents may testify about presidential activity that is itself criminal or directly relevant to questions of the criminal guilt or innocence of any defendant. As to whether the activity about which testimony is sought falls into one of these categories, it is for the judge to make this determination after an in camera review of all the evidence that is likely to be admitted. In civil cases, where the stakes for the parties are generally lower than in criminal cases, agents may testify only about those activities that are themselves illegal.\textsuperscript{152} In no cases should agents be allowed to testify about the substance

\textsuperscript{151} Secret Service testimony should not be considered “essential” unless it can be shown that agents possess information that is crucial to a case and that cannot be obtained from other sources. This is a standard similar to that which is applied in cases involving claims of journalistic privilege. See, e.g., Shoen v. Shoen, 48 F.3d 412, 416 (9th Cir. 1995) (party seeking to overcome journalistic privilege must show that information sought is “unavailable despite exhaustion of all reasonable alternative sources, noncumulative, and clearly relevant to an important issue in the case”); In re Petroleum Prod. Antitrust Litig., 680 F.2d 5, 7 (2d Cir. 1982) (journalistic privilege can be overcome “only upon a clear and specific showing that the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources”); Zerilli v. Smith, 656 F.2d 705, 713 (D.C. Cir. 1981) (evidence sought over claim of journalistic privilege must go to “the heart of the matter” in the case, and party seeking evidence must exhaust “every reasonable alternative source of information”). See also 28 C.F.R. § 50.10 (West 2008) (Department of Justice policy in both criminal and civil cases requires government to attempt to obtain information from alternative non-media sources before issuing a subpoena to a member of the news media).

\textsuperscript{152} The idea that parties to criminal cases are entitled to greater rights and safeguards than those afforded to parties to civil cases is a familiar one in our justice system, despite the fact that some civil cases undoubtedly carry more significant consequences than some criminal cases.
of other privileged communications involving the President, and nor should their presence be held to destroy the confidentiality necessary to sustain existing testimonial privileges.

In this form, the presidential privacy privilege recognizes and serves several important interests. The privilege accepts the importance of preserving the President’s safety, and places no limits on the ability of the Secret Service to safeguard the President; in fact, by reducing the incentive for the President to distance himself from his agents in order to maintain his privacy, the privilege may aid the Secret Service in its protective mission. The privilege also recognizes the importance of allowing the President to control some information about himself; it seeks to provide him with some degree of the privacy that we all need as human beings, and that we all enjoy as citizens. Finally, the privilege accommodates some of the most pressing competing claims of the justice system; it allows for Secret Service testimony about issues relating to criminal guilt and innocence, and does not prohibit the disclosure of information in which a person could not claim to have legitimate expectations of privacy.

VII. Conclusion

The first goal of this paper has been to demonstrate the fundamental nature of privacy as a moral value and as a legal right. I began with an examination of the important role played by privacy in the creation and maintenance of intimate relationships that are essential to our human development and flourishing. I then highlighted the role that privacy plays in fostering personal liberty and in promoting democracy. My discussion next looked at the various ways in which privacy has been protected under law, illustrating the breadth and depth of society’s commitment to protecting personal information against involuntary disclosure.

The second goal of this paper has been to argue that despite his public status, the President is entitled to some legitimate expectations of privacy and to have them protected under law. My discussion noted that the Supreme Court has in the past accepted that the President has some rights to control over personal information. I then evaluated the threats that Secret Service protection and testimony pose to those rights. Building on this analysis, I proceeded to propose a limited privilege that would protect the President’s privacy rights from invasion by allowing the President to presumptively prevent Secret Service agents from testifying in most cases.

The privilege I proposed in this paper seeks to strike an appropriate balance between the public’s need to protect the President, the President’s right to control information about himself, and the justice system’s need for relevant testimony. In the end the privilege may function far better than existing rules at promoting liberty and justice for everyone, for its basic premise is that all Americans – including the President – are entitled to equal rights under the law.