
PRESIDENTIAL PRIVACY VIOLATIONS

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Privacy violations are destructive, no matter the perpetrator, but governmental privacy violations cast a particularly long and destructive shadow. A recent illustration began in 2017, when the Department of Justice revealed the texts and extramarital affair of public servants to the press. The President amplified that information in a years-long smear campaign. To the public servants, the wreckage included job losses, stained reputations, physical danger, and emotional suffering. To the public, the damage included a further loss of trust in the government's ability to handle personal data with care. In the wake of privacy violations at the hands of powerful government actors, we must recognize the wrongs done to individuals and the public. Existing law provides some relief, but the government's own actions must play a part. At every branch and level, local, state, and federal, the government must work to restore public confidence in its data-handling practices. A key step would be to recognize intimate privacy as a foundational right.

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I. INTRODUCTION

Governments have done destructive things to individuals in the course of their work.¹ People's careers have been decimated by defamatory lies spread by government actors.² In the 1960s, at the instruction of Federal Bureau of Investigation ("FBI") Director J. Edgar Hoover, federal agents engaged in smear campaigns to discredit antiwar activists.³ Privacy violations were another regrettable feature of the Hoover years.⁴ FBI agents secretly bugged the hotel rooms of political activists, journalists, and other perceived enemies of the state in the hopes of obtaining embarrassing intimate information.⁵

When Presidents—aided by federal agencies—invade the privacy of individuals, the impact of the violation increases by orders of magnitude. Few government actors attract as much public attention and wield as much influence as the President. This was true for the 45th President, who proved to be an Olympic-level privacy violator.

On December 12, 2017, the Department of Justice ("DOJ") invited members of the press to view 375 handpicked texts exchanged between FBI officials involved in the investigations into Trump campaign officials' ties to Russia and former Secretary of State Hillary Clinton's use of a private email server. (Those officials had been involved in an extramarital affair.)⁶ Members of the media showed up as asked—after hours.⁷ Although many of the texts concerned routine work and everyday personal matters, some conveyed their fear of a Donald J. Trump presidency.⁸ The DOJ's disclosure facilitated

1. HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 98 (2019). I am taking Norton's invitation to develop the ideas in her book by examining ways that governmental disclosures of personal data violate intimate privacy.

2. *See id.* at 148–49.

3. *Id.* at 163 (describing the FBI's spread of lies about antiwar activists in the 1950s and 1960s to get them fired).

4. *See generally, e.g.*, DAVID J. GARROW, THE FBI AND MARTIN LUTHER KING, JR. (1981).

5. *See generally, e.g., id.*

6. These texts had been selected from thousands sent between those officials because they involved seemingly political matters. Laura Jarrett, *Months-Worth of FBI Employees' Texts Dreading Trump Victory Released to Congress*, CNN (Dec. 13, 2017, 12:13 AM), <https://www.cnn.com/2017/12/12/politics/peter-strzok-texts-released/index.html> [<https://perma.cc/7RY9-FF98>]; Tina Nguyen, *Has the D.O.J. Overplayed Its "Textgate" Scandal?*, VANITY FAIR (Dec. 15, 2017), <https://www.vanityfair.com/news/2017/12/peter-strzok-leaked-texts-mueller-probe> [<https://perma.cc/3Q98-LTNC>].

7. *See* Jarrett, *supra* note 6; Nguyen, *supra* note 6.

8. *See* Jarrett, *supra* note 6; Nguyen, *supra* note 6.

a presidential assault on the officials' intimate privacy,⁹ which left their lives in tatters.¹⁰

After the press wrote about the texts and affair, President Trump attacked the FBI officials in tweets, posts, and media interviews. He affixed them with demeaning nicknames and accused them of "treason."¹¹ He claimed that the texts showed that the FBI was out to get him and that the investigation into his campaign officials' connections to Russian interference in the 2016 election was a "hoax" and a "WITCH HUNT."¹² Again (and again and again), President Trump publicized the officials' extramarital affairs and exploited their texts to discredit Special Counsel Robert Mueller's investigation into the connection between the Trump campaign and Russian intelligence operations.¹³

The DOJ's and President's privacy violations did not just wreck the life's work and safety of esteemed public servants. They did not just exceed the bounds of propriety, basic humanity, and federal law. They cast doubt on everyone's intimate privacy.¹⁴ If government employees' texts could be accessed and revealed for political ends, then who else might face governmental intimate privacy violations? The DOJ's disclosure of the texts to reporters—which started the tsunami of abuse by the President and his supporters—undermined the notion that the government could be trusted with people's personal data.

9. Intimate privacy concerns the extent to which others have access to, and information about, our bodies; minds (e.g., innermost thoughts, desires, and fantasies); health; sexual activities; sex, sexual orientation, and gender identity and expression; and close relationships. In a series of articles, a book chapter, and a manuscript, I have been developing a theory of intimate privacy upon which this essay draws. *See generally DANIELLE KEATS CITRON, THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE* (forthcoming) (manuscript on file with author); Danielle Keats Citron, *Privacy Injunctions*, 71 EMORY L.J. 955 (2022); Danielle Keats Citron, *The Right to Sexual Privacy*, in *VISIONS OF PRIVACY IN THE MODERN AGE* (Marc Rotenberg, Jeramie Scott & Julia Horwitz, eds., 2015); Danielle Keats Citron, *A New Compact for Sexual Privacy*, 62 WM. & MARY L. REV. 1763 (2021); Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870 (2019); Danielle Keats Citron, *Why Sexual Privacy Matters for Trust*, 96 WASH. U. L. REV. 1189 (2019); Danielle Keats Citron, *The Roots of Sexual Privacy: Warren and Brandeis & the Privacy of Intimate Life*, 42 COLUM. J.L. & ARTS 383 (2019).

10. I am serving as a pro bono expert for those officials (Lisa Page and Peter Strzok) in their separate lawsuits against the Department of Justice. None of the details included here are based on confidential conversations with either Page or Strzok or their counsel. In drafting this Article, I relied on the court documents filed in the case as well as public statements, reports, and congressional testimony. I have gotten permission from Page and Strzok to include a few details from the interviews that I conducted with them in preparation of my forthcoming book *THE FIGHT FOR PRIVACY*.

11. Justin Sink, *Trump Accuses FBI Officials Who Investigated Him of Treason*, BLOOMBERG (Mar. 27, 2019, 9:55 PM), <https://www.bloomberg.com/news/articles/2019-03-28/trump-accuses-fbi-officials-who-investigated-him-of-treason> [https://perma.cc/T7Y3-J5HQ].

12. Gregory Korte, 'SPYGATE,' 'WITCH HUNT!' Trump Fumes over FBI's Handling of Russia Investigation, USA TODAY (May 23, 2018, 10:42 AM), [https://perma.cc/3CYR-C545](https://www.usatoday.com/story/news/politics/2018/05/23/trump-tweets-president-fumes-over-spygate-and-witch-hunt/636346002/).

13. See Philip Ewing, *Peter Strzok, Notorious Ex-G-Man, Explains Himself and Takes Aim at Trump*, NPR (Sept. 5, 2020, 6:01 AM), [https://perma.cc/QET3-CHYC](https://www.npr.org/2020/09/05/908016924/peter-strzok-notorious-ex-g-man-ex-plains-himself-and-takes-aim-at-trump).

14. See Justine Coleman, *Strzok Claims FBI, DOJ Violated His Free Speech, Privacy Rights*, HILL (Dec. 30, 2019, 2:45 PM), [https://perma.cc/9J9G-XF9U](https://thehill.com/regulation/court-battles/476262-peter-strzok-claims-fbi-doj-violated-his-free-speech-privacy-rights).

This Article explores the significance of governmental privacy violations, focusing on privacy violations at the hands of the President and the executive branch. Part II highlights governmental violations of intimate privacy. Part III explores the impact of presidential privacy violations on individuals and society. Part IV considers the legal ramifications and potential responses.

II. WHEN GOVERNMENT SPEECH VIOLATES INTIMATE PRIVACY

This Part sets the stage for this Article by describing ways the government has violated individuals' intimate privacy. It begins with examples of twentieth century governmental privacy violations. Then, it offers a case study: intimate privacy violations at the hands of President Trump and his Department of Justice.

A. *Twentieth Century Examples*

The executive branch has a long and ignominious history of weaponizing intimate information against perceived enemies.¹⁵ Consider the privacy violations committed at the direction of FBI Director J. Edgar Hoover.¹⁶ In the 1950s and 1960s, federal agents compiled detailed dossiers on the intimate lives of journalists, antiwar protestors, and civil rights activists.¹⁷ Prominently included was civil rights leader Dr. Martin Luther King.¹⁸ From October 1963 until his assassination in April 1968, the FBI conducted surveillance of the most intimate aspects of Dr. King's life.¹⁹ Agents wiretapped Dr. King's telephones at home and work.²⁰ They hid microphone bugs in his hotel rooms, recording him from adjoining rooms.²¹ Some of those recordings captured Dr. King's extramarital affairs.²²

The FBI's objective—or rather that of Director Hoover—was to damage and discredit the civil rights leader. The Bureau sent recordings capturing Dr. King's extramarital liaisons to media outlets in the hopes that they would

15. See generally SAMUEL DASH, THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT (2004). I use the term intimate information to cover information about one's body; health; sex, gender, and sexual orientation; sexual activity; mind (e.g., innermost thoughts, searches, and reading material); and close relationships.

16. See generally GARROW, *supra* note 4.

17. See generally, e.g., *id.*

18. Steven Bradford, *The FBI Secretly Recorded Martin Luther King Jr. for Years. Those Tapes Should Never See the Light of Day*, S.F. CHRON. (July 13, 2021), <https://www.sfchronicle.com/opinion/openforum/article/The-FBI-secretly-recorded-Martin-Luther-King-Jr-16312547.php?converted=1> [https://perma.cc/TAU2-Y3WX].

19. Jennifer Schuessler, *His Martin Luther King Biography Was a Classic. His Latest King Piece Is Causing a Furore.*, N.Y. TIMES (June 4, 2019), <https://www.nytimes.com/2019/06/04/arts/king-fbi-tapes-david-garrow.html> [https://perma.cc/V794-Vt4V].

20. *Id.*

21. David J. Garrow, *The Troubling Legacy of Martin Luther King*, STANDPOINT, May 30, 2019, at 30.

22. *Id.*

publish them, which they declined to do.²³ FBI agents mailed a copy to Dr. King with a letter warning, “[i]t is all there on the record, your sexual orgies . . . The American public . . . will know you for what you are—an evil abnormal beast . . . [T]here is only one thing left for you to do . . . You have just 34 days in which to do [it] . . .”²⁴

FBI agents can no longer indiscriminately spy on Americans’ intimate lives.²⁵ In the shadow of Hoover’s abuses and President Nixon’s cover-up of the Watergate break-in, Congress passed the Wiretap Act of 1968.²⁶ Law enforcement officers now must obtain a special warrant before listening to the conversations of U.S. persons.²⁷ The Supreme Court has also made clear that the Fourth Amendment’s protections extend to people’s private conversations if those individuals have a reasonable expectation of privacy in those conversations.²⁸

Foreign citizens, however, are a different matter. Their privacy enjoys far less protection than that of U.S. citizens.²⁹ After 9/11, the National Security Agency (“NSA”) amassed intimate information about “Muslim radicalizers,” including their visits to porn sites and sexually explicit communications with young girls.³⁰ The exposure of these facts would call into question a radicalizer’s “devotion to the jihadist cause” given the ban on pornography in Muslim countries.³¹ Along these lines, U.S. officials leaked that the SEAL Team found an extensive stash of porn at Osama bin Laden’s compound.³²

23. *Id.* In the 1950s and 1960s, the media often refused to publish the salacious details of the lives of public officials like Dr. King, President John F. Kennedy, and others. Such professional discretion began to recede in the 1980s. *See generally* AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS (2015). When Senator Gary Hart ran for President in 1987, he dared the press to follow him, thinking that major news outlets would not cover his extramarital affairs. *See generally* MATT BAI, ALL THE TRUTH IS OUT: THE WEEK POLITICS WENT TABLOID (2014). *The Miami Herald* called his bluff, leading to the coverage of his affair with Donna Rice and the end of his presidential campaign. *Id.* From that moment on, little in the lives of public officials was sacred, and the norms of discretion seemingly fell away. *See generally* RICHARD BEN CRAMER, WHAT IT TAKES: THE WAY TO THE WHITE HOUSE (First Vintage Books ed., 1993).

24. Andrew Prokup, *Read the Letter the FBI Sent to MLK to Try and Convince Him to Kill Himself*, VOX (Jan. 15, 2018, 9:22 AM), <https://www.vox.com/xpress/2014/11/12/7204453/martin-luther-king-fbi-letter> [<https://perma.cc/V6M7-Y96Z>]. Under Hoover’s direction, the FBI also compiled 360,000 files on government employees believed to be gay or lesbian. David A. Graham, *The Epistemic Quandary of the FBI and Trump*, ATLANTIC (Jan. 24, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-epistemic-quandary-of-the-fbi-and-trump/551276/> [<https://perma.cc/YP5V-EGQQ>].

25. There are some exceptions for the NSA, such as when we are talking about U.S. citizens communicating with foreign citizens. I am going to leave those rules aside for this piece.

26. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–23.

27. *See* Danielle Keats Citron, *Spying Inc.*, 72 WASH. & L. REV. 1243, 1262 (2015); Paul M. Schwartz, *Reviving Telecommunications Surveillance Law*, 75 U. CHI. L. REV. 287, 289–90 (2008).

28. Katz v. United States, 389 U.S. 347, 362 (1967); Berger v. New York, 388 U.S. 41, 53 (1967).

29. Glenn Greenwald & Ryan Grim, *Top-Secret Document Reveals NSA Spied on Porn Habits as Part of Plan to Discredit ‘Radicalizers’*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/nsa-porn-muslims_n_4346128?utm_hp_ref=politics+ [<https://perma.cc/6DLJ-EUTH>].

30. *Id.*

31. *Id.*

32. William Saletan, *Osama Bin Lustin’*, SLATE (May 17, 2011, 8:04 AM), <https://slate.com/news-and-politics/2011/05/osama-bin-laden-s-porn-as-propaganda-is-it-more-damning-than-his-terrorism.html> [<https://perma.cc/5J3W-BAGV>].

Federal investigators also have published intimate information about private U.S. persons caught up in public affairs. Consider the experience of Monica Lewinsky. In 1994, Judge Kenneth Starr was appointed to serve as Independent Counsel tasked with investigating President William Clinton and First Lady Hillary Rodham Clinton.³³ The Office of Independent Counsel (“OIC”) first looked at the Clintons’ investment in a land deal in Arkansas.³⁴ It grew to include the firing of employees in the White House travel office, the suicide of White House Counsel Vince Foster, and President Clinton’s lies about his sexual relationship with Lewinsky, who was then a twenty-three-year-old White House intern.³⁵

On September 9, 1998, Starr released his findings to the House of Representatives in a 453-page report, which was posted online two days later.³⁶ The Starr Report provided graphic, detailed descriptions of the sexual interactions and communications between Lewinsky and Clinton.³⁷ It was salacious for salaciousness’s sake. Because Clinton had already admitted to lying under oath, those details served no legitimate purpose.³⁸ Lawyers working for Starr tried to convince him to remove them, to no avail.³⁹ The Starr Report gratuitously described *every single sexual encounter* between Clinton and Lewinsky.⁴⁰ It detailed Lewinsky’s sexual expression in granular detail. The release of the Starr Report, Lewinsky has explained, “competes for the worst day” of her life with the day she was ambushed by the FBI at the behest of Starr’s team.⁴¹

As Lewinsky said in a TED Talk that she gave nearly twenty years later, the Starr Report affixed her with a permanent scarlet “A.” The Starr Report

33. See generally KENNETH W. STARR, A REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(C), H. R. DOC. NO. 105-310 (1988), <https://www.govinfo.gov/content/pkg/GPO-CDOC-106sdoc3/pdf/GPO-CDOC-106sdoc3-2.pdf> [hereinafter THE STARR REPORT].

34. *Id.* at 3.

35. See generally JAMES STEWART, BLOOD SPORT: THE PRESIDENT AND HIS ADVERSARIES (1997).

36. THE STARR REPORT, *supra* note 33.

37. *See id.* at 11–63.

38. Bob Woodward, *Kenneth Starr: A Prosecutor Bound by Duty*, WASH. POST (June 15, 1999), <https://www.washingtonpost.com/politics/clinton-impeachment/kenneth-starr-prosecutor-bound-by-duty/> [https://perma.cc/C5MS-JMTF].

39. Those lawyers were Brett Kavanaugh, now a Supreme Court Justice, and Notre Dame law professor William Kelley. *Id.*

40. Reading the Starr Report is akin to reading a pornographic novel, but crucially there is nothing consensual or fictitious about the details, which were taken from prosecutors’ depositions of Lewinsky. I refuse to recreate those details in this piece. Suffice it to say, the Table of Contents captures the point. THE STARR REPORT, *supra* note 33. For instance, Part II has the heading “1995: Initial Sexual Encounters.” It includes a narrative of “November 15 Sexual Encounter,” “November 17 Sexual Encounter,” and “December 31 Sexual Encounter.” *Id.* at III. Part III, entitled “January–March 1996: Continued Sexual Encounter,” discusses four sexual encounters and a phone call. *Id.* The Starr Report goes on like this for more than ten parts, most devoted to the description of sexual encounters on different days over many months. *Id.* at III–IV. Reading the Table of Contents—and just that—makes clear how unnecessary, how painful, and how exploitative the invasion of intimate privacy was for Lewinsky.

41. Jessica Bennett, *Monica Lewinsky Is (Reluctantly) Revisiting ‘That Woman’*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/arts/television/monica-lewinsky-impeachment-american-crime-story.html> [https://perma.cc/GNC4-ZTER].

defined and tormented her for years and years.⁴² As unsurprising as it is regrettable, only Lewinsky bore this burden. President Clinton's popularity rose after his impeachment in the House and narrow exoneration in the Senate for having lied while under oath about his affair with Lewinsky.⁴³ In stark contrast, the public persecuted and shamed Lewinsky for her sexuality.⁴⁴ She was blamed for the sexual relationship, even though Clinton possessed the power and control in their interactions.⁴⁵ Destructive gender stereotypes explain the imbalance.⁴⁶ *New York Times* writer Maureen Dowd echoed prevailing public sentiment in mocking Lewinsky as "slutty" and "ditsy."⁴⁷ The price of Starr's exploitation of Lewinsky's intimate privacy was exorbitant.⁴⁸

B. Case Study: The 45th President

Then there was the 45th Presidency. In December 2017, the executive branch began an assault on the intimate privacy of two public servants.⁴⁹ One of those public servants was Lisa Page, who served as Special Counsel to the FBI's Deputy Director Andrew McCabe.⁵⁰ Page started her legal career in the DOJ's Honors Program, working as a federal prosecutor for six years.⁵¹ Then, she joined the FBI to focus on counterintelligence cases.⁵² Page was a government lawyer through and through. The other public servant targeted by President Trump was Peter Strzok, then-Deputy Assistant Director of the FBI's Counterintelligence Division.⁵³ Strzok, a career FBI agent, was

42. Monica Lewinsky, *The Price of Shame*, TED TALKS (Mar. 20, 2015), https://www.ted.com/talks/monica_lewinsky_the_price_of_shame?language=en [https://perma.cc/EAY2-CR46].

43. Frank Newport, *Presidential Job Approval: Bill Clinton's High Ratings in the Midst of Crisis*, 1998, GALLUP (June 4, 1999), <https://news.gallup.com/poll/4609/presidential-job-approval-bill-clintons-high-ratings-midst.aspx> [https://perma.cc/K24G-XSDB].

44. See Bennett, *supra* note 41.

45. Judy Kurtz, *Monica Lewinsky: 'The Idea that I Bore More Responsibility' than Clinton Is 'Insane'*, HILL (Oct. 7, 2021, 11:10 AM), <https://thehill.com/blogs/in-the-know/in-the-know/575738-monica-lewinsky-the-idea-that-i-bore-more-responsibility-than> [https://perma.cc/A24E-3E53].

46. See generally PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* (2004) (describing intersecting gender and racist stereotypes that pain Black women as hypersexual and deviant).

47. Erin Gloria Ryan, *Maureen Dowd Praises #MeToo—After Years of Slut-Shaming Monica Lewinsky*, DAILY BEAST (Dec. 12, 2017, 8:12 PM), <https://www.thedailybeast.com/maureen-dowd-praises-metooafter-years-of-slut-shaming-monica-lewinsky> [https://perma.cc/4C4E-N9WK].

48. It has taken twenty years for Lewinsky to come to some peace with the experience. Bennett, *supra* note 41.

49. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION iii (2018), <https://www.justice.gov/file/1071991/downloadOIG> [https://perma.cc/CF4X-6LDY] [hereinafter REVIEW OF 2016 ELECTION].

50. *Id.*

51. Molly Jong-Fast, *Lisa Page Speaks: 'There's No Fathomable Way I Have Committed Any Crime at All'*, DAILY BEAST (Dec. 17, 2019, 1:22 PM), <https://www.thedailybeast.com/lisa-page-speaks-theres-no-fathomable-way-i-have-committed-any-crime-at-all> [https://perma.cc/23JY-DH86].

52. *Id.*

53. See REVIEW OF 2016 ELECTION, *supra* note 49, at iii.

considered “one of the most experienced and trusted F.B.I. counterintelligence investigators.”⁵⁴

Page and Strzok worked together, first on the investigation into former Secretary of State Hillary Rodham Clinton’s use of a private email server.⁵⁵ Then, they served on the team investigating Trump campaign officials—Carter Page, Paul Manafort, George Papadopoulos, and Michael Flynn—who were suspected of coordinating with Russian operatives during the 2016 presidential election.⁵⁶ When Special Counsel Robert Mueller took over the Russia investigation, Page and Strzok both provided help, with Page serving a forty-five-day stint and Strzok for longer.⁵⁷

During some of that time, Page and Strzok had an extramarital affair.⁵⁸ They used their FBI phones to communicate with one another.⁵⁹ In thousands of texts, they talked about work.⁶⁰ They traded stories about their families.⁶¹ They discussed health issues.⁶² They talked about politics.⁶³ And, in some of those texts, they “expressed hostility toward then-candidate Trump and statements of support for candidate Clinton.”⁶⁴

In ordinary times, Page and Strzok’s texts would have remained between them. No one would have retrieved them from the FBI’s electronic storage system. No one would have inquired about their political views. According to FBI policy, employees may express their views about politics and political candidates in private and in public.⁶⁵ But these were not ordinary times.

54. Michael S. Schmidt, Matt Apuzzo & Adam Goldman, *In Texts, FBI Officials in Russia Inquiry Said Clinton ‘Just Has to Win’*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/us/fbi-trump-russia.html> [https://perma.cc/MM9M-CJPM].

55. OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., REPORT OF INVESTIGATION: RECOVERY OF TEXT MESSAGES FROM CERTAIN FBI MOBILE DEVICES 4 (2018) [hereinafter RECOVERY OF TEXT MESSAGES].

56. *Id.*

57. *Id.* at 4–5; Caitlin Oprysko, *Lisa Page Sues DOJ and FBI over Release of Her Text Messages*, POLITICO (Dec. 10, 2019, 5:06 PM), <https://www.politico.com/news/2019/12/10/lisa-page-sues-doj-fbi-text-messages-081001> [https://perma.cc/8Z9F-HKXE]. See generally OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI’S CROSSFIRE HURRICANE INVESTIGATION (2019) [hereinafter FOUR FISA APPLICATIONS].

58. Molly Jong-Fast, *Why Lisa Page Has Been Such an Intense and Constant Target of Trump’s Ire*, WASH. POST (Dec. 5, 2019), https://www.washingtonpost.com/opinions/why-lisa-page-has-been-such-an-intense-and-constant-target-of-trumps-ire/2019/12/05/c997ddc2-17a0-11ea-a659-7d69641c6ff7_story.html [https://perma.cc/WB64-YXQB].

59. Jong-Fast, *supra* note 51.

60. REVIEW OF 2016 ELECTION, *supra* note 49, at 398.

61. *Id.*

62. *Id.*

63. For instance, Page wrote to Strzok that Trump “cannot be president.” Strzok said of a potential Trump presidency: “I’m scared for our organization.” Page also expressed concerns about a Clinton presidency. Schmidt et al., *supra* note 54.

64. REVIEW OF 2016 ELECTION, *supra* note 49, at 396–97.

65. 5 C.F.R. 734.402(a) (2021) (FBI employees have the right to “express his or her opinion as an individual privately and publicly on political subjects and candidates”); Natasha Bertrand, *In ‘Highly Unusual’ Move, DOJ Secretly Invited Reporters to View Texts Sent by Ousted FBI Agents*, BUS. INSIDER (Dec. 13, 2017), <https://www.businessinsider.com/peter-strzok-page-texts-mueller-russia-trump-2017-12> [https://perma.cc/4A UP-U9BS].

After President Trump won the election, he began attacking federal law enforcement.⁶⁶ In tweets and interviews, he denounced the FBI's investigation into Russia's interference with the election as a "witch hunt."⁶⁷ Shortly thereafter, the DOJ's Office of the Inspector General ("OIG") began a review of the investigations on which Page and Strzok had worked.⁶⁸ The OIG's Midyear Review assessed the handling of the investigation into Secretary Clinton's email use; Crossfire Hurricane Review examined the propriety of the investigation into Trump campaign officials' ties to Russia.⁶⁹

In connection with those reviews, the OIG requested copies of Page and Strzok's texts, as well as the texts of other investigators on the team.⁷⁰ On July 27, 2017, the OIG notified Deputy Attorney General Rod Rosenstein and Special Counsel Robert Mueller about texts exchanged between Page and Strzok that touched on their views about a potential Trump presidency.⁷¹ Strzok was removed from the Special Counsel investigation.⁷² Page had already returned to the FBI.⁷³

Five months later, on December 2, 2017, news stories revealed the existence of texts by FBI employees that might show bias against President Trump.⁷⁴ The *New York Times* published a piece naming Strzok as one of those employees and noting his removal from the Special Counsel's investigation.⁷⁵ That same day, a *Washington Post* story identified Page as the other employee who allegedly authored "politically charged texts."⁷⁶ The story said that Page and Strzok, who were both married, had been romantically involved.⁷⁷

When the stories broke, the President took to Twitter to respond. In a series of tweets, President Trump said that the FBI was the "worst in History"

66. Rebecca Savransky, *Trump: 'You Are Witnessing the Single Greatest WITCH HUNT in American Political History'*, THE HILL (June 15, 2017, 8:08 AM), <https://thehill.com/homenews/administration/337901-trump-you-are-witnessing-the-single-greatest-witch-hunt-in-american> [https://perma.cc/3JDH-399L].

67. *Id.*

68. RECOVERY OF TEXT MESSAGES, *supra* note 55, at 9.

69. Complaint at 5, Lisa Page v. U.S. Dep't of Just. & Fed. Bureau of Investigation (D.D.C. filed Dec. 10, 2019) [hereinafter Complaint]. Under FBI's policy, the agency preserves electronic communications about criminal cases. Although there is not a policy directing the preservation of texts on FBI phones, technology specialists retained text messages as a matter of practice. RECOVERY OF TEXT MESSAGES, *supra* note 55, at 5.

70. RECOVERY OF TEXT MESSAGES, *supra* note 55, at 395–96.

71. *Id.* at 397.

72. *Id.* at 10.

73. REVIEW OF 2016 ELECTION, *supra* note 49, at 397.

74. Michael S. Schmidt, Matt Apuzzo & Adam Goldman, *Mueller Removed Top Agent in Russia Inquiry over Possible Anti-Trump Texts*, N.Y. TIMES (Dec. 2, 2017), <https://www.nytimes.com/2017/12/02/us/politics/mueller-removed-top-fbi-agent-over-possible-anti-trump-texts.html> [https://perma.cc/F3A3-CJN7].

75. *Id.*

76. Karoun Demirjian & Devlin Barrett, *Top FBI Official Assigned to Mueller's Russia Probe Said to Have Been Removed After Sending Anti-Trump Texts*, WASH. POST (Dec. 2, 2017), https://www.washingtonpost.com/world/national-security/two-senior-fbi-officials-on-clinton-trump-probes-exchanged-politically-charged-texts-disparaging-trump/2017/12/02/9846421c-d707-11e7-a986-d0a9770d9a3e_story.html [https://perma.cc/Z665-KWXN].

77. *Id.*

and that “its reputation is in Tatters.”⁷⁸ He tweeted, “Report: ‘ANTI-TRUMP FBI AGENT LED CLINTON EMAIL PROBE’ . . . Now it all starts to make sense!”⁷⁹

At that point, no one had shown Page and Strzok’s texts to reporters. No one at the DOJ had disclosed their contents to members of the public. That changed, however, on December 12, 2017. That evening, the DOJ disclosed the texts to the media in a manner reminiscent of a low-brow political thriller.⁸⁰ DOJ spokesperson Sarah Isgur Flores summoned a group of reporters to her office.⁸¹ Starting at 8:30 p.m., she let the reporters review a ninety-page document containing 375 text messages that Page and Strzok had sent to each other.⁸² Heightening the secretive nature of the revelation, Flores told the reporters they “were not permitted to remove or copy the messages and could not source the messages to DOJ.”⁸³

Prominent news outlets like Politico, NBC News, and the *Washington Post* began publishing stories about Page and Strzok’s text messages around 9:30 p.m. and continued into the night.⁸⁴ The stories quoted the text messages, speculated about the potential implications for the Russia investigation, and underscored that Strzok and Page had been engaged in an extramarital affair.⁸⁵ Politicians, social media users, and the conservative media ecosystem seized on the story, amplifying it well beyond the reach of traditional media.⁸⁶

The next day, Deputy Attorney General Rod Rosenstein appeared before the House Judiciary Committee. In connection with the hearing, copies

78. Schmidt et al., *supra* note 54.

79. *Id.*

80. Natasha Bertrand, *DOJ Now Says Early Release of FBI Agents’ Private Texts to Reporters Was ‘Not Authorized’ by the Department*, BUS. INSIDER (Dec. 15, 2017, 8:17 AM) <https://www.businessinsider.com/doj-says-early-release-of-fbi-agents-texts-was-not-authorized-2017-12> [https://perma.cc/US8M-JDVA]. The DOJ’s antics—telling reporters to show up after dark and that they could only look at the handpicked texts and could not source the story to DOJ—have little in common with sophisticated spy novels of Graham Greene or John le Carré. They were crude, ham-handed, and deeply damaging in ways that I will explore in Part III.

81. Complaint, *supra* note 69, at 13.

82. *Id.* The OIG issued a statement on December 15, 2017, explaining that it told the DOJ that it did not object to certain text messages being released to Congress, but it was silent about any release to the media. The statement noted: “[a]t no time prior to the release of the text messages did the Department consult with OIG about providing records to the media.” Press Release, Off. of the Inspector Gen., U.S. Dep’t of Just. (Dec. 15, 2017).

83. Complaint, *supra* note 69, at 13 (emphasis added).

84. Devlin Barrett, *FBI Texts Reveal Anti-Trump, Pro-Clinton Comments*, WASH. POST (Dec. 12, 2017), https://www.washingtonpost.com/world/national-security/fbi-texts-reveal-anti-trump-pro-clinton-comments/2017/12/12/e0685f80-dfa4-11e7-bbd0-9dfb2e37492a_story.html [https://perma.cc/Z665-KWXN]; Josh Gerstein, *In Texts, FBI Agents on Russia Probe Called Trump an ‘Idiot’*, POLITICO (Dec. 12, 2017, 9:30 PM), <https://www.politico.com/story/2017/12/12/fbi-agents-trump-mueller-texts-294156> [https://perma.cc/72PQ-BRTB]; Julia Ainsley, *Justice Dept. Releases Text Messages from Anti-Trump FBI Agent, Lawyer Who Were Having Affair*, NBC NEWS (Dec. 13, 2017, 12:34 AM), <https://www.nbcnews.com/news/us-news/justice-dept-releases-text-messages-anti-trump-fbi-agent-lawyer-n829061> [https://perma.cc/VZ7Q-MFTC].

85. See, e.g., *FBI Agent Peter Strzok’s Texts with Lisa Page Disparage Trump Throughout Campaign*, CBS NEWS (Dec. 13, 2017, 5:05 AM), <https://www.cbsnews.com/news/peter-strzok-lisa-page-texts-trump-idiot/> [https://perma.cc/49LH-FKZF]; Ainsley, *supra* note 84; Barrett, *supra* note 84; Gerstein, *supra* note 84.

86. Complaint, *supra* note 69, at 11.

of the texts had been shared with select members of the committee.⁸⁷ Congressman Jamie Raskin remarked, “we got a dump of hundreds of text messages that we’ve been spending most of the day talking about between Mr. Strzok and Ms. Page. And they no doubt make for fascinating reading. It’s a little bit like ‘Anna Karenina’ to go through them.”⁸⁸

Representative Raskin was right.⁸⁹ Less than one-quarter of the texts could be described as having any connection to politics or Trump himself.⁹⁰ Congressman Raskin aptly observed that Page and Strzok were “a couple now made almost as famous as Bonnie and Clyde or Romeo and Juliet.”⁹¹ “We’ve all read and heard the titillating messages between the two,” he remarked.⁹² Congressman Mike Johnson agreed that “everyone in America now knows the sordid history and the infamous text messages between FBI agents Peter Strzok and Lisa Page.”⁹³

That day, and in the days and months to follow, the President laid a destructive path, exacerbating the DOJ’s privacy violation. President Trump tweeted that the “NEW FBI TEXTS ARE BOMBSHELLS!”⁹⁴ In dozens of television interviews, press conferences, tweets, and statements from the White House, he disparaged Page and Strzok’s extramarital relationship and accused them of treason.⁹⁵ The President’s tweets denounced Page and Strzok as “stupid, sick lovers” and other variations on that theme.⁹⁶ For instance, President Trump accused Page of being “incompetent,” “corrupt,” “pathetic,” “stupid,” a “dirty cop,” a “loser,” a “great lover,” “a clown,” “sick people,” a “wonderful lover,” a “stupid lover,” and “bad people.”⁹⁷ He called for Strzok’s firing.⁹⁸

87. *Id.* at 11–13.

88. *Oversight Hearing with Deputy Attorney General Rod Rosenstein, Hearing Before H. Comm. on the Judiciary*, 115th Cong. 63 (2017). Rosenstein testified that the DOJ released the texts “to make sure that it is clear to you and the American people, we are not concealing anything that is embarrassing to the FBI.” *Id.* at 37.

89. Complaint, *supra* note 69, at 11–12.

90. *Id.*

91. *Oversight of the FBI and DOJ Actions in Advance of the 2016 Election, Joint Hearing Before H. Comm. on Oversight and Government Reform and on the Judiciary*, 115th Cong. (2018).

92. *Id.*

93. *Id.*

94. Jordan Fabian, *Trump: Newly Released FBI Texts Are ‘Bombshells,’* THE HILL (Feb. 7, 2018, 11:34 AM), <https://thehill.com/homenews/administration/372725-trump-newly-released-fbi-texts-are-bombshells> [https://perma.cc/ELV9-C2BH].

95. Complaint, *supra* note 69, at 19. The privacy violations were startling given the fact that Trump, as a presidential candidate, valued his own intimate privacy. To ensure that the public did not find out about his extramarital affair with Stormy Daniels, he had his attorney Michael Cohen pay considerable sums to Ms. Daniels to keep their affair secret. Brett Neely & Domenico Montanaro, *Trump Admits to Authorizing Stormy Daniels Payoff, Denies Sexual Encounter*, NPR (May 2, 2018, 10:39 PM), <https://www.npr.org/2018/05/02/607943366/giuliani-says-trump-did-know-about-stormy-daniels-payment> [https://perma.cc/G8SG-C75V].

96. Complaint, *supra* note 69, at 19.

97. *Id.*

98. Trump tweeted, “Peter Strzok should have been fired long ago.” Natasha Bertrand, *Peter Strzok Sues over Firing for Anti-Trump Texts*, POLITICO (Aug. 6, 2019, 2:22 PM), <https://www.politico.com/story/2019/08/06/peter-strzok-lawsuit-firing-trump-texts-1448615> [https://perma.cc/S7GQ-F6AW].

President Trump continued to publicize Page and Strzok's affair and their texts even after the OIG issued a report, on June 16, 2018, which found no evidence of bias impacting the Clinton investigation.⁹⁹ The President claimed—in direct contravention of his own OIG's findings—that the 2018 report “destroy[ed] . . . the great lovers, Peter Strzok and Lisa Page, who started the disgraceful Witch Hunt against so many innocent people.”¹⁰⁰ He suggested (falsely) that sinister reasons explained why not all of the texts had been divulged: “19,000 demanded Text messages between Peter Strzok and his FBI lover, Lisa Page, were purposely and illegally deleted. Would have explained whole Hoax.”¹⁰¹ In 2019, Trump tweeted, “When Lisa Page, the lover of Peter Strzok, talks about being ‘crushed’ and how innocent she is, ask her to read Peter’s ‘Insurance Policy’ text, to her, just in case Hillary loses.”¹⁰²

President Trump's tweets about Page and Strzok were retweeted thousands upon thousands of times.¹⁰³ Assuming that an average Twitter user has 500 followers,¹⁰⁴ those retweets could collectively have launched the President's tweets into millions of other Twitter users' timelines. And that would not include the thousands upon thousands of people who viewed President Trump's tweets and only “liked” them, or who saw them but did not interact with them.

President Trump used the texts at campaign rallies. On October 11, 2019, before thousands of people and news cameras, President Trump performed a dramatic reading of some of the texts. “I love you, Peter, I love you, Lisa,” mocked the President.¹⁰⁵ He pretended to orgasm, as if he were Strzok, while saying Page's first name.¹⁰⁶ Amidst the recreation of imagined private communications between Page and Strzok, President Trump said, “[t]hese are corrupt people, folks.”¹⁰⁷ At another rally, President Trump falsely suggested that Page had procured a restraining order against Strzok.¹⁰⁸ The President's performances were the height of cruelty and denial of dignity.

99. REVIEW OF 2016 ELECTION, *supra* note 49, at 4.

100. Bertrand, *supra* note 98 (quoting @realDonaldTrump).

101. John Kruzel, *No Evidence FBI Officials' Texts Deliberately Erased, as Donald Trump Said*, POLITICO (Dec. 19, 2018), <https://www.politifact.com/factchecks/2018/dec/19/donald-trump/no-evidence-fbi-officials-texts-deliberately-erase/> [https://perma.cc/LS3Y-X9QK] (quoting @realDonaldTrump). The OIG found that the deleted texts were the result of an FBI-wide failure that impacted one-quarter of all employee phones; they were not purposefully deleted, as the tweet suggested. REVIEW OF 2016 ELECTION, *supra* note 49, at 397 n.198.

102. Complaint, *supra* note 69, at 20 (screen shot of @realDonaldTrump's December 2, 2019 tweet).

103. *Id.*

104. This number is likely conservative; a 2016 survey of 95 million accounts suggests that the average Twitter user has 707 followers. See Ryan MacCarthy, *The Average Twitter User Now Has 707 Followers*, KICK-FACTORY (June 23, 2016), <https://kickfactory.com/blog/average-twitter-followers-updated-2016/> [https://perma.cc/DAE4-G6DM].

105. *User Clip: Trump Peter Strzok & Lisa Page*, C-SPAN (Oct. 10, 2019), <https://www.c-span.org/video/?c4822026/user-clip-trump-peter-strzok-lisa-page> [https://perma.cc/KZH6-A9YB].

106. *Id.*

107. *Id.*

108. LiveNOW from FOX, *Full Rally: President Trump in Hershey, Pennsylvania*, YOUTUBE, at 21:30 (Dec. 10, 2019), <https://www.youtube.com/watch?v=Ag11iGH1mZQ> [https://perma.cc/6QV3-DYLJ]. A claim

Other politicians followed President Trump's lead, exploiting news about the texts to smear Strzok and Page. Senator Rand Paul dubbed Page the "FBI Mistress" and accused her of colluding in a "witch hunt."¹⁰⁹ Right-wing pundit Ann Coulter wondered "whether federal penal regulations would allow Peter Strzok and Lisa Page to share a cell."¹¹⁰

President Trump and his allies continued to publicize the texts and affair after the OIG issued another report, on December 9, 2019, finding no evidence of political bias during the investigation of the Trump campaign officials' ties to Russia.¹¹¹ The 2019 OIG report found that Page "did not play a role in the decision to open Crossfire Hurricane or the four individual cases."¹¹² It explained that while Strzok was directly involved in the decisions to open the investigation into the four individual cases, "he was not the sole, or even the highest-level decision maker as to any of those matters."¹¹³ As the OIG found, it was Strzok's supervisor, Bill Priestap, who made the decision to open the investigation.¹¹⁴ The OIG found no "documentary or testimonial evidence that political bias or improper motivation influenced Priestap's decision" to open Crossfire Hurricane or any indications of improper motivations or political bias on the part of the participants, including Strzok.¹¹⁵

III. UNDERSTANDING THE DAMAGE

This Part highlights the damage wrought by presidential privacy violations. It details the personal devastation that often results. Then, it turns to the societal implications of governmental privacy violations, including the corrosion of civic trust.

A. *Destroyed Careers, Disrupted Lives*

Presidential privacy violations can change the arc of people's lives, upending their careers, life plans, and personal safety. This was true in the past; it is even more true in the present. Online networks have an exponential reach, and search engines ensure near-perfect memories.

Let's consider the impact of President Trump's and the DOJ's intimate privacy violations. During their government careers, Page and Strzok stayed

that Page refuted. Lisa Page (@NatSecLisa), TWITTER (Dec. 11, 2019, 9:37 AM), <https://twitter.com/NatSecLisa/status/1204772246847393793?ctx=HHwWgsC0ibb-mrghAAAA> [https://perma.cc/RU6M-8RLL] ("This is a lie. Nothing like this ever happened.").

109. Rand Paul (@RandPaul), TWITTER (Mar. 13, 2019, 1:45 PM), <https://twitter.com/randpaul/status/1105887640879022080?lang=en> [https://perma.cc/7AFY-PZ8Q] (12.6K retweets).

110. Ann Coulter (@AnnCoulter), TWITTER (Jan. 26, 2018, 6:36 PM), <https://twitter.com/AnnCoulter/status/957034416542568449> [https://perma.cc/ELZ5-X9DQ].

111. FOUR FISA APPLICATIONS, *supra* note 57, at iii.

112. *Id.*

113. *Id.*

114. *Id.* at iii.

115. *Id.* at iii–iv.

out of the public eye as best they could. Neither used social media. Neither gave public interviews. The possibility that they might attract attention was anathema to them both.

All of that changed after the DOJ provided their texts to the media and President Trump began his years-long assault on their intimate privacy.¹¹⁶ No longer could Page or Strzok remain anonymous to the public while of course known to their friends, family, and coworkers. No longer could Page be just a career GS-15-level civil servant.¹¹⁷ No longer could Strzok play a crucial role in national security investigations. Once the President turned their intimate relationship into a public spectacle, nothing about their lives was the same.

The executive branch's privacy violations effectively ended the government careers of two long-standing public servants. For Page, being a government lawyer was a source of great pride and personal fulfillment.¹¹⁸ But she resigned from the FBI because staying seemed impossible in the aftermath of the privacy violations.¹¹⁹ Although Page is now working in the private sector, she is being paid far less than colleagues who share her same unique—and sought after—professional expertise.¹²⁰ Regaining a professional footing thus far has been impossible for Strzok. He has not found full-time work since.

The reputational and professional damage has continued for years; it may well continue for many, many more. Once privacy violations appear online, they cannot be escaped or erased.¹²¹ Unlike print newspapers or magazines with their limited reach and eventual fate in trash cans or recycling bins, search engines index content, produce it instantly, and keep it forever. There is no forgetting in the digital age. As I explained in an article discussing how twenty-first-century technologies intensify emotional and reputational harms:

These types of emotional and reputational harms are alive and well today, and they are, in many ways, far worse [than in prior centuries]. While public disclosures of the past were more easily forgotten, memory decay has largely disappeared. Because search engines reproduce information cached online, people cannot depend upon time's passage to alleviate reputational and emotional damage. . . . [E]mployers may not want to get involved with people . . . who come with publicized baggage.¹²²

Employers treat Google searches of people's names as part of their resumes.¹²³ Online searches are often the first things that clients and coworkers

116. See Telephone Interview with Lisa Page, Nat'l Sec. & Legal Analyst, NBC News & MSNBC (Apr. 24, 2021).

117. Complaint, *supra* note 69, at ¶ 13.

118. *See id.*

119. *Id.* at ¶ 70.

120. Telephone Interview with Lisa Page, *supra* note 116.

121. DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 4 (2014).

122. Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1813–14 (2010).

123. *See* CITRON, *supra* note 121, at 2–3.

see, so employers are reluctant to hire someone with a damaged online identity.¹²⁴ “According to a 2009 Microsoft study, nearly 80 percent of employers consult search engines to collect intelligence on job applicants, and about 70 percent of the time they reject applicants due to their findings.”¹²⁵ Common reasons for not interviewing or hiring applicants include concerns about “lifestyle,” “inappropriate” online comments, and “unsuitable” information about them.¹²⁶ According to a national study of hiring managers and human resource professionals conducted in 2017, 70% of employers surveyed said that they conduct online searches for prospective hires and 50% said that they assess whether candidates have a “professional online persona.”¹²⁷ A 2020 study found that a staggering 98% of employers conduct background research online to know more about job candidates.¹²⁸

Applicants usually don’t get the chance to explain destructive posts to potential employers.¹²⁹ Recruiters don’t inquire about salacious information and defamatory falsehoods posted online.¹³⁰ As I wrote in *Hate Crimes in Cyberspace*, the “simple but regrettable truth is that after consulting search results, employers take the path of least resistance. They just do not call to schedule interviews or to extend offers.”¹³¹ And one can’t blame employers. This is a rational reaction. It is easier to hire someone who does not come with a damaged reputation, no matter how qualified or exemplary the candidate with a damaged online reputation may be.

Google searches of Page’s and Strzok’s names are filled with links to stories that discuss their texts and affair and that include defamatory accusations. As I write this piece in the fall of 2021, the first five pages of a Google search of Page’s name is filled with stories that begin “Trump target Lisa Page,” “Fired FBI Lawyer Lisa Page,” and “Trump Blasts MSNBC for hiring ex-FBI lawyer Lisa Page.”¹³² The same is true for Strzok. The first five pages of his search results are filled with links entitled “Ex-FBI agent Strzok,” “Probe ‘purposely and illegally’ deleted Peter Strzok and Lisa . . . ,” “FBI

124. See *id.*

125. *Id.* at 8.

126. *Id.*

127. Press Release, CareerBuilder, Number of Employers Using Social Media to Screen Candidates at All-Time High, Finds Latest CareerBuilder Study (June 15, 2017).

128. Kelsey McKeon, *5 Personal Branding Tips for Your Job Search*, MANIFEST (Apr. 28, 2020), <https://themanifest.com/digital-marketing/5-personal-branding-tips-job-search> [<https://perma.cc/C4YA-DPGR>].

129. CITRON, *supra* note 121, at 8.

130. *Id.*

131. *Id.*

132. Of course, the titles of those stories are fraught with falsehoods—Page was never fired from the FBI. See, e.g., *Trump Target Lisa Page Blasts His ‘Orgasm’ Mockery of Her*, BBC (Dec. 2, 2019), <https://www.bbc.com/news/world-us-canada-50634645> [<https://perma.cc/CE3N-3L35>]; Lawrence Yee, *Fired FBI Lawyer Lisa Page Joins MSNBC and NBC News as National Security and Legal Analyst*, WRAP (June 5, 2020), <https://www.thewrap.com/lisa-page-joins-nbc-msnbc-legal-analyst/> [<https://perma.cc/9XFJ-5AH2>]; Mary Kay Linge, *Trump Blasts MSNBC for Hiring Ex-FBI Lawyer Lisa Page: ‘Total Disgrace’*, N.Y. POST (June 6, 2020), <https://nypost.com/2020/06/06/trump-blasts-msnbc-for-hiring-ex-fbi-lawyer-lisa-page/> [<https://perma.cc/E9BW-YWQC>].

agent Peter Strzok fired over anti-Trump texts,” and “Peter Strzok should be jailed for his action as FBI agent.”¹³³

The stories filling the pages of a Google search of Page’s and Strzok’s names will be uniquely damaging to Page as a woman. As sociologists, philosophers, and legal scholars have shown, gender norms put women in a double bind.¹³⁴ They reinforce gendered stereotypes that simultaneously cast women as either sexually promiscuous or frigid and either way as incompetent, subservient sexual objects.¹³⁵ They are socially punished for having more than one sexual partner whereas men are not.¹³⁶ They are seen as promiscuous and disgusting; men involved with more than one sexual partner are not viewed that way.¹³⁷ If women are from a marginalized group, the shame and disgust compounds.

The years-long and highly public exploitation of the texts—both online and offline—affixed Page with a damaged, sexualized, and stigmatized identity, harming her professional reputation and making it impossible for her to lead a normal life. The President repeatedly talked about the texts as illustrations of Page’s deviance: he branded her a traitorous “sick lover,” deviant criminal, and “slut” unfit for public service.¹³⁸ Other politicians, commentators, and individuals online echoed those misogynistic comments.¹³⁹ Page’s online identity—which was virtually nonexistent before the December 12, 2017 disclosure—is now almost completely tied to the text messages and to her relationship with Strzok. And it is sexualized and stigmatized because of the “homewrecking” narrative that pervades the internet.

133. See, e.g., *Ex-FBI Agent Strzok Due Out with Book About Trump, Russia*, POLITICO (July 28, 2020, 9:26 AM), <https://www.politico.com/news/2020/07/28/ex-fbi-agent-trump-russia-book-383897> [https://perma.cc/BW9M-SH2S]; Gabriella Muños, *Donald Trump: Mueller Probe ‘Purposely and Illegally’ Deleted Peter Strzok and Lisa Page Texts*, AP NEWS (Dec. 18, 2018), <https://apnews.com/article/3d1e5af5f556c8b3be5d16877ca5a41c> [https://perma.cc/WDS5-4TVE]; Matt Zapotosky, *FBI Agent Peter Strzok Fired over Anti-Trump Texts*, WASH. POST (Aug. 13, 2018), https://www.washingtonpost.com/world/national-security/fbi-agent-peter-strzok-fired-over-anti-trump-texts/2018/08/13/be98f84c-8e8b-11e8-b769-e3ff17f0689_story.html [https://perma.cc/VM63-Z2NM]; Curt Greer, *Peter Strzok Should Be Jailed for His Action as FBI Agent*, HERALDNET (Sept. 18, 2020, 1:30 AM), <https://www.heraldnet.com/opinion/peter-strzok-should-be-jailed-for-his-action-as-fbi-agent/> [https://perma.cc/T7R9-B3SM].

134. See generally SARA AHMED, *LIVING A FEMINIST LIFE* (2017); SARA AHMED, *QUEER PHENOMENOLOGY: ORIENTATIONS, OBJECTS, OTHERS* (2006); TRESSIE McMILLAN COTTON, *THICK: AND OTHER ESSAYS* (2019); IRIS MARION YOUNG, *ON FEMALE BODY EXPERIENCE: “THROWING LIKE A GIRL” AND OTHER ESSAYS* (2005); PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (1991); IRIS MARION YOUNG, *INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY, AND POLICY* (1997) [hereinafter *INTERSECTING VOICES*]; KIMBERLÉ CRENSHAW, *ON INTERSECTIONALITY: ESSENTIAL WRITINGS* (2017); ROBIN WEST, *CARING FOR JUSTICE* (1997); KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* (2018).

135. See generally Iris Marion Young, *Five Faces of Oppression*, in *JUST. & POL. DIFFERENCE* 39 (Iris Marion Young ed., 1990); Martha C. Nussbaum, *Objectification and Internet Misogyny*, in *OFFENSIVE INTERNET* 68 (Saul Levmore & Martha C. Nussbaum eds., 2012); *INTERSECTING VOICES*, *supra* note 134.

136. See *INTERSECTING VOICES*, *supra* note 134, at 99; Jimmie Manning & Danielle M. Stern, *Heteronormative Bodies, Queer Futures: Toward a Theory of Interpersonal Panopticism*, 21 INFO. COMM’N & SOC’Y 208, 219 (2018).

137. See COLLINS, *supra* note 134, at 163–79.

138. Complaint, *supra* note 69, at ¶ 78.

139. See *id.* (“The President’s tweets about Ms. Page have been retweeted and favorited millions of times.”).

Gender norms create structures of permission to discriminate against women.¹⁴⁰ They explain why women are more likely to suffer harm in the job market due to privacy violations.¹⁴¹ When women act inconsistently with gender norms, when they step out of line and have extramarital affairs, they often suffer the price of nonconformity.¹⁴² President Trump's tweets—and the media coverage of the texts and extramarital affair—conjured up those stereotypes, casting Page as a “bad” and loose woman.¹⁴³ Page's Twitter account has been a magnet for horrifying and misogynistic comments.¹⁴⁴ Twitter users have questioned whether she was qualified for her job or whether she slept her way into the FBI, accused her of sleeping with multiple of her colleagues, and described her with sexually demeaning and sexually threatening language. These stereotypes will be and have surely been harmful to Page in her professional career.

Page's reputational harm piqued the interest of a former judge and lawyer, Patricia Barnes, who wrote a piece for *Forbes* analogizing Page to Monica Lewinsky.¹⁴⁵ She noted that Page is a victim of “slut shaming on a national scale” and that, as with Lewinsky, Page is “a reluctant public figure in a sexually charged national scandal.”¹⁴⁶ As with Lewinsky, “the silence of women’s groups is deafening, and Democrats understandably don’t want to dwell on the matter.”¹⁴⁷

For both Page and Strzok, the harm is sure to live on in search results of their names. Information about romantic relationships attracts wide audiences.¹⁴⁸ Sex and gossip sell. We are mesmerized by sensuality. We want to know, and we eagerly share, information about people’s sexual habits and intimate relationships.¹⁴⁹ We share provocative content online—content that we might not say to people face-to-face—because we feel anonymous.¹⁵⁰ We click, like, and share gossip, especially about extramarital affairs, because we forget that real people are involved. We struggle to connect the stories

140. AHMED, LIVING A FEMINIST LIFE, *supra* note 134, at 30; Citron, *Sexual Privacy*, *supra* note 9, at 1907.

141. See generally CITRON, *supra* note 121.

142. See Citron, *Sexual Privacy*, *supra* note 9, at 1928.

143. See Complaint, *supra* note 69, at ¶ 78.

144. Patricia Barnes, *Has Lisa Page Inherited the Mantle from Monica Lewinsky?*, FORBES (Dec. 11, 2019, 7:39 PM), <https://www.forbes.com/sites/patriciagbarnes/2019/12/11/has-lisa-page-inherited-the-mantle-from-monica-lewinsky/?sh=28223de77685> [https://perma.cc/JL3E-WJYQ].

145. *Id.*

146. *Id.*

147. *Id.*

148. See Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1767 (2019).

149. See generally Richard B. Krueger & Meg S. Kaplan, *Noncontact Paraphilic Sexual Offences*, in SEXUAL OFFENDING: PREDISPOSING ANTECEDENTS, ASSESSMENTS AND MANAGEMENT 79 (Amy Phenix & Harry M. Hoberman eds., 2016).

150. CITRON, *supra* note 121, at 58; see Chesney & Citron, *supra* note 148, at 1792; Danielle Keats Citron, *Cyber Mobs, Disinformation, and Death Videos: The Internet as It Is (and as It Should Be)*, 118 MICH. L. REV. 1073, 1092 (2020).

circulating behind screens with the real-world harms inflicted on flesh-and-blood human beings.¹⁵¹

The passage of time is unlikely to change the nature of the stories in search results of Page's and Strzok's names because news outlets like Fox and OANN continue to highlight their affair and texts.¹⁵² After Page broke her silence in late 2019, Fox News host Laura Ingraham publicly ridiculed Page's statements about the traumatic fallout of the disclosures.¹⁵³ In 2020, the Conservative Political Action Conference hosted a play titled "FBI Lovebirds" that was based on the text messages.¹⁵⁴ On March 7, 2021, Fox News personality Maria Bartiromo discussed the texts on air, more than four years after their initial release.¹⁵⁵

It was, and remains, difficult for Page and Strzok to respond to the privacy violations in a way that would impact their search results. At the time of the President's initial attacks, Page and Strzok were prohibited by the FBI from responding.¹⁵⁶ Page talked to me about her reluctance to speak out.¹⁵⁷ After Page left her government job, she still felt like she should not respond.¹⁵⁸ The President attacked her with the force of the bully pulpit while she had to stay silent.¹⁵⁹ Page also knew that if she did respond (as she did a few times on Twitter after resigning from the FBI), she would face online abuse of a particularly frightening sort—mobs on Twitter threatened rape and filled her tweets with demeaning and frightening sexualized comments.¹⁶⁰ She faced hundreds of destructive comments whenever she posted online.¹⁶¹ Those hostile, misogynistic tweets were so numerous because many of them

151. See CITRON, *supra* note 121, at 58.

152. See, e.g., Sam Dorman, *Former FBI Lawyer Lisa Page Rips 'Monstrous' Trump: I Sent a 'Few Mean Texts,' He 'Assaulted' Protesters*, FOX NEWS (June 2, 2020, 12:20 PM), <https://www.foxnews.com/media/lisa-page-trump-texts-assaulted-protesters> [https://perma.cc/7FPG-C2CL].

153. Matthew Rozsa, *Fox News Host Laura Ingraham Mocks Lisa Page for Speaking out Against President Trump's Attacks*, SALON (Dec. 3, 2019, 6:52 PM), <https://www.salon.com/2019/12/03/fox-news-host-laura-ingraham-mocks-lisa-page-for-speaking-out-against-president-trumps-attacks/> [https://perma.cc/EG8G-WNMB].

154. Anthony L. Fisher, *CPAC Staged a Play Based on Ex-FBI Agent Peter Strzok and Ex-FBI Lawyer Lisa Page's Anti-Trump Texts*, BUS. INSIDER (Feb. 27, 2020, 6:08 PM), <https://www.businessinsider.com/cpac-play-fbi-peter-strzok-lisa-page-anti-trump-texts-2020-2> [https://perma.cc/XY4M-QHM5].

155. Press Release, Fox News, Sunday Morning Futures w/ Maria Bartiromo (Mar. 7, 2021), <https://video.foxnews.com/v/6237800569001/#sp=show-clips> [https://perma.cc/997X-N2UW].

156. Telephone Interview with Lisa Page, *supra* note 116.

157. *Id.*

158. *Id.*

159. *Id.*

160. Page's experience is like so many women's experiences online. As my scholarship has explored, women and minorities disproportionately face cyberstalking, and the attacks often involve sexually demeaning and sexually threatening content. CITRON, *supra* note 121, at 14; Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 65–66 (2009); Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 374–75 (2009). For women of color, lesbian and trans women, disabled women, and women with other intersecting marginalized identities, the harm compounds in devastating ways. *Id.* at 380.

161. See Christopher Bouzy, *Is There a Targeted Troll Campaign Against Lisa Page? A Bot Sentinel Investigation*, LAWFARE (Jan. 22, 2020, 7:14 PM), <https://www.lawfareblog.com/there-targeted-troll-campaign-against-lisa-page-bot-sentinel-investigation> [https://perma.cc/3L5C-G8ZQ].

were automated.¹⁶² Lawfare Editor-in-Chief Benjamin Wittes ran the hostile responses to one of Page's tweets through @BotSentinel, which rates the likelihood of an account being a Trollbot.¹⁶³ Wittes found that all of the tweets were reported to have a "high probability of being troll bots."¹⁶⁴ Page spent hours upon hours reporting tweets as abusive.¹⁶⁵

Then there is the physical danger connected to the loss of anonymity.¹⁶⁶ For months and months, Page worried that strangers would recognize her and confront her on the subway.¹⁶⁷ Whenever Trump tweeted or talked about Strzok, he would receive death threats.¹⁶⁸ Strangers threatened his family.¹⁶⁹ The FBI warned Strzok that he appeared on a list compiled by Cesar Sayoc, who sent pipe bombs to President Trump's critics.¹⁷⁰ To this day, Strzok continues to be targeted with online threats.¹⁷¹ There is no end in sight for the abuse.¹⁷²

The emotional fallout has been severe. Page found it excruciating to watch the President hijack her private communications and romantic relationship to degrade her. As Page explained to MSNBC journalist Rachel Maddow: "I've led an entirely anonymous life and hoped to return to one. When the president did that vile simulated sex act in a rally . . ."¹⁷³ "It's like being punched in the gut. My heart drops to my stomach when I realize he has tweeted about me again. He's demeaning me and my career. It's sicken-ing."¹⁷⁴

The damage appears to have no ending point. The exploitation of the texts and the affair has continued years after the DOJ disclosed them to the media and Trump began talking about them.¹⁷⁵ And in turn so does the reputational, economic, physical, and emotional harm suffered by Page and Strzok.

162. *See id.*

163. Benjamin Wittes (@Benjamin-Wittes), TWITTER (Jan. 18, 2020, 12:04 PM), <https://twitter.com/benjaminwittes/status/1218594962310344704?lang=en> [https://perma.cc/7HFZ-HE6X].

164. *Id.*

165. Telephone Interview with Lisa Page, *supra* note 116.

166. The loss of anonymity—or obscurity—is a type of privacy violation. *See* Woodrow Hartzog & Evan Selinger, *Surveillance as Loss of Obscurity*, 72 WASH. & LEE L. REV. 1343, 1363–64 (2015).

167. Jong-Fast, *supra* note 51.

168. *See* Natasha Bertrand, *Peter Strzok Would Like to Clear a Few Things Up*, POLITICO (Sept. 5, 2020, 6:00 AM), <https://www.politico.com/news/2020/09/05/peter-strzok-would-like-to-clear-a-few-things-up-409280> [https://perma.cc/MH4C-BB49].

169. Darren Samuelsohn (@dsamuelsohn), TWITTER (Aug. 8, 2019, 2:14 PM), https://twitter.com/dsamuelsohn/status/1159543499752124421?ref_src=twsrc%5Etfw [https://perma.cc/Z4Z2-JCM9].

170. *See* Bertrand, *supra* note 168.

171. *Id.*

172. *See* Jong-Fast, *supra* note 51.

173. Jeffery Martin, *Lisa Page Regrets Peter Strzok Text Messages, Rebukes Trump for Mocking Her with Vile, Simulated Sex Act' Performance*, NEWSWEEK (Dec. 17, 2019, 10:28 PM), <https://www.newsweek.com/lisa-page-regrets-peter-strzok-text-messages-rebukes-trump-mocking-her-vile-simulated-sex-act-1477856> [https://perma.cc/J3ZS-UQZH].

174. *Id.*

175. *See id.*

B. Trust Decay

The DOJ's privacy violation and the President's virtual bullhorn came at a time when the public's trust in government was already at a record low.¹⁷⁶ Indeed, the lack of trust in the Trump Administration followed years and years of the decay of trust in government and all major institutions.¹⁷⁷ Trust in government has steadily fallen over the past fifty years.¹⁷⁸ The same is true for the public's confidence in the presidency to protect people's interests.¹⁷⁹ Whereas 51% of survey respondents reported a "great deal" of confidence in the President in 2009, only 38% could say the same in 2019.¹⁸⁰

This erosion of trust in the government matters. Trust in government "encourages compliance with laws."¹⁸¹ It lets us depend upon public institutions in times of crisis.¹⁸² It "ensure[s] that people seek out and heed guidance on how to protect themselves and their families."¹⁸³ And it lays the foundation for people feeling comfortable sharing personal information with government agencies, which can be crucial for the provision of public services, employment, and health and safety.¹⁸⁴

The DOJ's and President Trump's privacy violations did nothing to bolster faith in the government's commitment to protect the privacy of data that they have collected about us.¹⁸⁵ Little else signifies the imprimatur of the State like the words and actions of the executive branch.¹⁸⁶ When the DOJ showed the *press* copies of employees' texts without their permission, federal law enforcers signaled that they can't be trusted to handle intimate data. And

176. See Lee Rainie, Scott Keeter & Andrew Perrin, *Trust and Distrust in America*, PEW RSCH. CTR. (July 22, 2019), <https://www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america/> [https://perma.cc/3W3Q-JJV5].

177. See *id.*

178. JENNIFER KAVANAGH, KATHERINE GRACE CARMAN, MARIA DEYOREO, NATHAN CHANDLER & LYNN E. DAVIS, THE DRIVERS OF INSTITUTIONAL TRUST AND DISTRUST: EXPLORING COMPONENTS OF TRUSTWORTHINESS 1–10 (2020) [hereinafter DRIVERS OF INSTITUTIONAL TRUST AND DISTRUST].

179. See *id.* at 10.

180. *Id.* at 10 (reproducing the results of 2019 Gallup poll).

181. *Id.* at 12.

182. See *id.* at 5 ("[T]he notion of trust implies a willingness to depend upon another party . . . with reasonable security [without] control over that party.") (internal quotation marks omitted).

183. *Id.* at 1.

184. Social psychology research helps us appreciate the necessity of trust for people to share intimate information about themselves. As researchers have shown, people share sensitive information about themselves with their intimate partners and close friends because they believe that their information will be treated with care and discretion. Gordon J. Chelune, Joan T. Robison & Martin J. Kommor, *A Cognitive Interactional Model of Intimate Relationships*, in *COMMUNICATIONS, INTIMACY, AND CLOSE RELATIONSHIPS* 11, 14 (Valerian J. Delega ed., 1984). When our trust in others corrodes, so does our willingness to disclose personal information. Although our close personal relationships differ from our relationships with the government, the core lessons remain the same—that people will be leery to share personal information if they do not believe information will be handled with care.

185. DRIVERS OF INSTITUTIONAL TRUST AND DISTRUST, *supra* note 178, at 1.

186. There is important scholarship on the ever-expanding power of Presidents and the executive branch. See generally Z. Payvand Ahdout, *Enforcement Lawmaking & Judicial Review*, 135 HARV. L. REV. 937 (2022); Curtis Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201 (2018); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

when the President exposed the private lives of individuals, the highest officer of the land was saying that no one's intimate privacy is secure.¹⁸⁷ The DOJ's exposure of the texts to journalists and the President's exploitation of those texts showed that the government couldn't be trusted with intimate information.¹⁸⁸ It indicated that anyone's texts can be obtained and exploited for political ends. Of course, federal employees got that message, but so did the public at large.¹⁸⁹

The intimate privacy violations—at the hands of the DOJ and the President—occurred at a time when government needed people to trust the executive branch with intimate information. When the Coronavirus began spreading in the United States, public health officials began talking about tracing cases, which would involve sharing location and health information with authorities.¹⁹⁰ Resistance from the public was strong.¹⁹¹ If the Trump Administration had followed through on those proposals, we might have had trouble convincing people to share their intimate information.

Some might push back on my case study and dismiss it as a single aberrational event.¹⁹² Even if President Trump and the DOJ showed spectacular incompetence or even malevolence, their intimate privacy violations nonetheless set precedent and build on history. It can't be dismissed as just one uniquely bad example. We can draw parallels to President Nixon and his executive branch.¹⁹³ The intimate privacy violations that the public learned about—such as the surveillance of Dr. King—and those that surely existed but were never shared with the public, were egregious and would have been even more damaging had the press's objectives aligned with the FBI's agenda.¹⁹⁴ They included the burglary of the office of Daniel Ellsberg's

187. See Jong-Fast, *supra* note 51.

188. *See id.*

189. As my scholarship has explored, we are awash in violations of intimate privacy—with threats posed by individuals, companies, and government. *See* Citron, *Sexual Privacy*, *supra* note 9, at 1874; Citron, *A New Compact for Sexual Privacy*, *supra* note 9, at 1764; Citron, *Privacy Injunctions*, *supra* note 9, at 5–10. *See generally* CITRON, THE FIGHT FOR PRIVACY, *supra* note 9.

190. *See* Brianna Navarre, *COVID-19 Data-Driven Spark Privacy and Abuse Fears*, U.S. NEWS (Jan. 19, 2022, 6:00 AM), <https://www.usnews.com/news/best-countries/articles/2022-01-19/contact-tracing-biometrics-raise-privacy-concerns-amid-pandemic> [https://perma.cc/6DGX-JQBN].

191. *See* Colleen McClain & Lee Rainie, *The Challenges of Contact Tracing as U.S. Battles COVID-19*, PEW RSCH. CTR. (Oct. 30, 2020), <https://www.pewresearch.org/internet/2020/10/30/the-challenges-of-contact-tracing-as-u-s-battles-covid-19/> [https://perma.cc/XF4Z-8MSS].

192. Scholars of the executive branch who have written about the Trump Administration face the criticism that the Trump Administration was *sui generis*, so no lessons can be learned from it. My colleague Payvand Ahdout hears that frequently in workshops in connection with her brilliant work on enforcement law-making and judicial review. Those critics miss the forest for the trees.

193. *There Are More Parallels Right Now Between Watergate and the Trump White House than Ever Before*, BUS. INSIDER (Sept. 8, 2018, 9:22 AM), <https://www.businessinsider.com/parallels-between-watergate-trump-white-house-mueller-russia-nixon-2018-9> [https://perma.cc/6EBU-N7LS].

194. Sam Briger, *Documentary Exposes How the FBI Tried to Destroy MLK with Wiretaps, Blackmail*, NPR (Jan. 18, 2021, 9:00 AM), <https://www.npr.org/2021/01/18/956741992/documentary-exposes-how-the-fbi-tried-to-destroy-mlk-with-wiretaps-blackmail> [https://perma.cc/9WV8-PFD7].

psychiatrist to obtain his medical records.¹⁹⁵ Congress responded to those abuses with its full force in passing privacy legislation that I will discuss in Part IV. Congress needs to pay the same attention here.

Then, too, the revelation of Page and Strzok's texts may be the tip of the privacy-violation iceberg. Yes, it came to light because the press wrote breathlessly about it and because the President shouted about the privacy violations from his Twitter rooftops.¹⁹⁶ Those privacy violations decayed the public's trust in the government's ability to safeguard personal information. But the trust decay is compounded by the fact that we can't know what else—or who else's information—the DOJ or another part of the executive branch may have failed to protect or deliberately disclosed to others in violation of people's privacy.¹⁹⁷

Government agencies need to collect people's personal information to provide help during times of crisis.¹⁹⁸ People need to trust the government to handle their personal data with care. There will be no shortage of crises in the future given the state of the climate crisis and the possibility of future pandemics.¹⁹⁹ Although we have only begun to understand the implications of the Trump Administration's actions on a variety of issues, the President's and the DOJ's intimate privacy violations are a dark stain. No doubt, they undermined the trust that we all need to have in the federal government to seek its help.

The rupture in trust due to governmental privacy violations is what led Congress to adopt the federal law at the heart of Page and Strzok's case against the DOJ,²⁰⁰ which I will now discuss.

IV. ASSESSING THE LAW AND POTENTIAL REFORMS

This Part begins with a brief overview of the legal implications of governmental intimate privacy violations. The law is not as protective as it should be, but we can tinker with law only so much to garner the trust of the public. The rest of the work will have to come from messages sent by government officials and agencies.

195. Christian Appy, *How Richard Nixon's Obsession with Daniel Ellsberg and the Pentagon Papers Sowed the Seeds for the President's Downfall*, CONVERSATION (Apr. 23, 2021, 8:27 AM), <https://theconversation.com/how-richard-nixons-obsession-with-daniel-ellsberg-and-the-pentagon-papers-sowed-the-seeds-for-the-presidents-downfall-159113> [https://perma.cc/K3GH-JPHV].

196. See Dan Mangan, *Trump Target Lisa Page Sues Justice Department, FBI over 'Unlawful' Disclosure of Texts with Peter Strzok*, CNBC (Dec. 10, 2019, 5:11 PM), <https://www.cnbc.com/2019/12/10/trump-target-lisa-page-sues-justice-department-fbi-over-strzok-texts.html> [https://perma.cc/9SKD-GB5Q].

197. Thanks to Payvand Ahdout for raising this terrific point with me.

198. *Ensuring Data Privacy as We Battle COVID-19*, OECD (Apr. 14, 2020), <https://www.oecd.org/coronavirus/policy-responses/ensuring-data-privacy-as-we-battle-covid-19-36c2f31e/> [https://perma.cc/EU2H-DQ87].

199. See *The Future of Government: How Will Governments Prepare for Future Crisis?*, WORLD BANK (Nov. 17, 2021), <https://www.worldbank.org/en/events/2021/11/12/the-future-of-government-how-will-governments-prepare-for-future-crisis#1> [https://perma.cc/K74G-W7KD].

200. See *Overview of the Privacy Act of 1974*, U.S. DEPT' OF JUST. (Feb. 24, 2021), <https://www.justice.gov/archives/opcl/policy-objectives> [https://perma.cc/U66P-GHVP].

A. The Privacy Act of 1974

This discussion begins with the most obvious avenue for legal protection: the Privacy Act of 1974 (“Privacy Act”).²⁰¹ The Privacy Act’s history is especially instructive for the violation of Page’s and Strzok’s privacy. Federal lawmakers passed the Privacy Act in direct response to executive branch privacy violations.²⁰² There was massive outcry after the public learned about President Nixon’s cover-up of the break-ins at the Democratic Party’s Watergate headquarters and the office of Daniel Ellsberg’s psychiatrist, as well as Director Hoover’s excesses.²⁰³

Federal lawmakers pointed to the abuses of Watergate and the FBI’s illegal surveillance of political “subversive[s]” like Dr. King as proof that federal legislation was necessary.²⁰⁴ Senator Sam Ervin, the principal sponsor of the Privacy Act of 1974, said of the bill: “[i]f we have learned anything in the last year of Watergate, it is that there must be limits upon what the Government can know about each of its citizens.”²⁰⁵ The Privacy Act “sought to restore trust in government and to address what at the time was seen as an existential threat to American democracy.”²⁰⁶ Senator Ervin introduced the bill as “an important step in the protection of our individual right to be let alone.”²⁰⁷ He explained:

Rich or poor, male or female, whatever one’s cultural style or religious or political views, each of us is subject to cumulative records being stored by a variety of Government agencies and private organizations. One of the most obvious threats the computer poses to privacy comes in its ability to collect, store, and disseminate information without any subjective concern for human emotion and fallability [*sic*] . . . [T]his bill [] is essential in order to preserve individual freedoms. We must act now to create safeguards against the present and potential abuse of information about people.²⁰⁸

The Privacy Act sets the conditions under which federal agencies like the DOJ can collect, use, and disclose personally identifiable information included in systems of records.²⁰⁹ Under the Privacy Act, federal agencies are allowed to store only personal information that is relevant and necessary, to maintain records with accuracy and completeness, and to establish appropriate administrative and technical safeguards to assure the security of records.²¹⁰ The Privacy Act prohibits agencies like the DOJ from disclosing

201. 5 U.S.C. § 552a.

202. *Overview of the Privacy Act of 1974*, *supra* note 200.

203. *See id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *See generally* PRISCILLA M. REGAN, *LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY* (1995).

208. *Id.* at 6.

209. 5 U.S.C. § 552a(b).

210. *Id.* § 552a(e)(1–10).

records without the written permission of “the individual to whom the record pertains.”²¹¹

Although the Privacy Act applies to the DOJ, it does not apply to Presidents or their advisers.²¹² Courts have found that the Offices of the President or Vice President—“units of the Executive Office of the President whose sole function is to advise and assist the President”—are not covered by the Privacy Act.²¹³ President Trump isn’t bound by the Privacy Act even though its passage was prompted in part by presidential privacy abuses.²¹⁴

Now more than ever we need the constraints set by the Privacy Act. Whereas in the analog age records gathered by the government tended to remain in information silos (like filing cabinets), in the digital age, records can be disclosed to parties that should not see them and then information about those records or the records themselves can be seamlessly and instantly shared with anyone and everyone with access to the internet.²¹⁵ And once personal information stored in agency records is disclosed and shared without permission, it can be difficult—if not impossible—to undo its publication.²¹⁶

To be sure, the Privacy Act provides exemptions to the disclosure provision, but none of these exemptions cover disclosures to the press, as was the case when the DOJ disclosed Page and Strzok’s texts without permission.²¹⁷ The most frequently invoked exemption is the “routine use” provision. Under the Privacy Act, “the term ‘routine use’ means, with respect to the disclosure of the record, the use of such record for a purpose which is compatible with the purpose for which it was collected.”²¹⁸ The “principle of compatibility requires a significant degree of convergence and a concrete relationship between the purpose for which the information was gathered and its application.”²¹⁹ It seems unlikely that a court would find that the DOJ’s disclosure of texts *to the press* is compatible with the reason the FBI stored the communications of its agents.²²⁰ That disclosure had nothing to do with the OIG review or any other investigation. Indeed, since the OIG investigations were ongoing, it arguably undermined those efforts by drawing publicity to the texts.

211. *Id.* § 552a(b).

212. *Alexander v. FBI*, 456 F. App’x 1, 2 (D.C. Cir. 2011) (per curiam).

213. *Falwell v. Exec. Off. of the President*, 113 F. Supp. 2d 967, 968–70 (W.D. Va. 2000); *see Alexander*, 456 F. App’x at 2. In *Wilson v. Libby*, the D.C. Circuit noted that “Congress did not inadvertently omit the Offices of the President and Vice President from the Privacy Act’s disclosure requirements.” 535 F.3d 697, 708 (D.C. Cir. 2008).

214. *Libby*, 535 F.3d at 701.

215. *See id.* at 701–02.

216. *Id.*

217. 5 U.S.C. § 552a(j).

218. *Id.* at § 552a(a)(7).

219. PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW 96–97 (1996) (citing *Britt v. Naval Investigative Serv.*, 886 F.2d 544, 549–50 (3d Cir. 1989)).

220. *See id.*

Another exemption concerns the disclosure of agency information to Congress or its committees and subcommittees,²²¹ which does not apply to disclosures to individual members of Congress.²²² But the problem wasn't the DOJ's disclosure of the texts to Congress. It was its overnight revelation of the texts to reporters to ensure that the press covered them as gossip and to discredit the FBI's investigation into the Trump campaign officials' ties to Russia.

Bottom line: none of the exemptions seem to apply. This means that the DOJ does not have a statutory way out. The DOJ arguably violated the Privacy Act when it disclosed the texts to reporters without the permission of Page or Strzok. Of course, the pending lawsuits will address that issue.²²³

If the DOJ is found to have violated the Privacy Act, the next question is the extent of the damages that Page and Strzok can recover. Under the Supreme Court's interpretation of the Privacy Act, individuals can recover economic damages that result from an agency's deliberate disclosure of personal information.²²⁴ In the case of Page and Strzok, the evidence of economic harm is plentiful. Their careers and earning power have suffered a serious financial blow as a result of the DOJ's disclosure of the texts to the press on December 12, 2017.²²⁵ The disclosure led to countless news stories, interviews, and tweets about Page and Strzok's texts and their extramarital affair.²²⁶ That virtual tsunami and the resulting damage to their Google CVs is why Page has been paid far less than her peers with similar experience.²²⁷ It is why Strzok has been unable to find permanent employment.²²⁸ Yes, that is right—even though Strzok was considered one of the best counterintelligence investigators in the nation, he has been unable to find employment for five years. For both Page and Strzok, the financial losses are extensive.

So, too, was their emotional suffering, and yet mental distress is not redressable under the Privacy Act (at least under current judicial interpretation). In *Doe v. Chao*,²²⁹ the U.S. Department of Labor improperly disclosed the Social Security Numbers of people filing for benefits under the Black Lung Benefits Act. A group of plaintiffs sued under the Privacy Act.²³⁰ The lead plaintiff stated that he was "torn . . . all to pieces" by the disclosure and was "greatly concerned and worried."²³¹ The U.S. Supreme Court held that

221. 5 U.S.C. § 552a(b)(9).

222. *Swensen v. U.S. Postal Serv.*, 890 F.2d 1075, 1077 (9th Cir. 1989) (finding that the congressional exemption "applies only to a house of congress or a committee or subcommittee, not to individual congressmen").

223. As of the late spring 2022, Page and Strzok's lawsuits were amidst discovery.

224. *See generally Doe v. Chao*, 540 U.S. 614 (2004).

225. *See Bertrand, supra* note 168.

226. *Id.*

227. *See Jong-Fast, supra* note 51.

228. *Bertrand, supra* note 168.

229. 540 U.S. at 625–26.

230. *Id.* at 616–17.

231. *Id.* at 617–18.

the statutory damages provision under the Privacy Act was only available if plaintiffs established actual damages.²³²

In a later case, *Federal Aviation Administration v. Cooper*,²³³ a pilot sued a federal agency for disclosing his HIV status to another federal agency, which caused him emotional distress.²³⁴ The Court ruled that that emotional distress alone could not amount to actual damages under the Privacy Act.²³⁵ Three justices, writing in dissent, argued that Congress passed the Privacy Act to protect against “substantial harm” that included “embarrassment, inconvenience, or unfairness to any individual.”²³⁶ The result of the Court’s holding was that a “federal agency could intentionally or willfully forgo establishing safeguards to protect against embarrassment and no successful private action could be taken against it for the harm Congress identified.”²³⁷

Emotional distress is precisely the type of harm that privacy violations commonly inflict. As Daniel J. Solove and I have explained in our work, “one of the most common types of harm caused by privacy violations is emotional distress.”²³⁸ In one sphere of tort law—the privacy torts spawned from law partners Samuel Warren and Louis Brandeis’s article *The Right to Privacy*—courts have consistently recognized emotional distress as cognizable harm.²³⁹ In their famous article, Warren and Brandeis emphatically noted that privacy violations primarily involve an “injury to the feelings.”²⁴⁰ Privacy invasions interfered with a person’s “estimate of himself,” inflicting “mental pain and distress, far greater than could be inflicted by mere bodily injury.”²⁴¹

Specifically addressing judicial reluctance to recognize emotional harm, Warren and Brandeis began by noting how the common law had matured to recognize and redress a variety of types of intangible harms beyond physical ones.²⁴² “[I]n early times,” they wrote, “the law gave a remedy only for physical interference with life and property.”²⁴³ Subsequently, the law expanded to recognize incorporeal injuries: “From the action of battery grew that of assault. Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed.”²⁴⁴ They noted how defamation law protected a person’s name without requiring proof of financial or physical

232. *Id.* at 627; see Ryan Calo, *Privacy Harm Exceptionalism*, 12 COLO. TECH. L.J. 361, 361–62 (2014) (discussing the Court’s refusal to recognize emotional harm as a basis for statutory damages under the Privacy Act).

233. See generally 566 U.S. 284 (2012).

234. *Id.* at 289.

235. *Id.* at 304.

236. *Id.* at 309 (Sotomayor, Ginsburg, and Breyer, JJ., dissenting) (quoting 5. U.S.C. § 552a(e)(10)).

237. *Id.*

238. Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. Rev. 793, 841 (2022).

239. *Id.* at 842.

240. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890).

241. *Id.* at 196–97.

242. *Id.* at 193.

243. *Id.*

244. *Id.* at 194.

harm.²⁴⁵ Warren and Brandeis argued that recognition of emotional harm was a sign of a more advanced civilization, and by implication, failure to do so would be crude and uncivilized.²⁴⁶

Congress should amend the Privacy Act to ensure that compensation for deliberate violations includes anxiety, depression, and other forms of emotional distress. In recognizing emotional harm, Congress would signal its recognition of the emotional fallout after the government exposes intimate information in violation of our trust and intimate privacy.

B. Constitutional Right to Information Privacy

Another possible avenue for redress is the right to information privacy under the Fifth and Fourteenth Amendments' Due Process Clauses. In *Whalen v. Roe*,²⁴⁷ the Court suggested that the Due Process Clause protects individuals against the improper disclosure of their private information.²⁴⁸ In *Whalen*, a group of patients and doctors challenged a New York statute requiring a centralized collection of the names and addresses of patients taking certain prescription drugs.²⁴⁹ The database was meant to help the State detect the diversion of drugs into illegal markets.²⁵⁰ Plaintiffs argued that the law illegitimately burdened their "individual interest in avoiding disclosure of personal matters."²⁵¹

The Court set the stage for the recognition of a right to information privacy in holding that cases characterized as protecting privacy include the "individual interest in avoiding disclosure of personal matters."²⁵² That interest rested on the Bill of Rights' protection of substantive due process in the Fifth and Fourteenth Amendments.²⁵³ The Court upheld the statute and found the state's interest in detecting drug crimes outweighed the plaintiffs' privacy interest because the plaintiffs' data was adequately secured.²⁵⁴ According to Justice Brennan's concurrence, had there been a real risk of disclosure to

245. *Id.* at 197.

246. *See id.* at 193.

247. *See generally* 429 U.S. 589 (1977).

248. Khiara Bridges has described the Court's rulings as a "maybe"—indeed. For a brilliant and careful argument for why the Court should recognize a right to information privacy that covers the state's dignity-denying demands for information from individuals, notably poor expecting mothers, see KHIARA BRIDGES, THE PROPERTY OF PRIVACY RIGHTS 8 (2017).

249. *Whalen*, 429 U.S. at 591.

250. *See id.* at 595.

251. *Id.* at 599.

252. *Id.*

253. *See id.* at 605–06. I write this in the wake of the Court's decision in *Dobbs v. Jackson Women's Health Organization*, striking down *Roe v. Wade* and its protection of the right to privacy and liberty in the decision to terminate a pregnancy. Justice Thomas's concurrence suggests that substantive Due Process rights, including information privacy, may be in jeopardy. No matter, I write with future courts and evolving judicial doctrine in mind.

254. *Id.* at 601–02.

unauthorized individuals, the State's amassing of plaintiffs' health data might have raised constitutional concerns.²⁵⁵

Since *Whalen*, the Supreme Court has twice suggested—but only suggested—that a substantive due process right to information privacy exists.²⁵⁶ In those cases, the law challenged was found not to violate the right because safeguards prevented the unwarranted disclosure of personal information.²⁵⁷ In *National Aeronautics & Space Administration v. Nelson*,²⁵⁸ contract employees at a government laboratory challenged background checks that required them to answer questions about their emotional health, drug treatment, and psychological counseling.²⁵⁹ The Court held that the government's interests in managing its operations, combined with protections to secure the information, satisfied plaintiffs' ““interest in avoiding disclosure” that may ‘arguably ha[ve] its roots in the Constitution.’”²⁶⁰

Lower federal courts have recognized a constitutional right to information privacy where the State has inappropriately disclosed personal data.²⁶¹ Some circuits have protected information implicating fundamental rights like family relationships, procreation, and contraception.²⁶² Others have protected health information about which individuals enjoy a reasonable expectation of privacy, like HIV information, abortion procedures, and personal diaries.²⁶³

The DOJ's disclosure of the curated 375 texts might amount to a violation of Page's and Strzok's right to information privacy since the texts concerned their intimate relationship. Page and Strzok surely had a reasonable expectation of privacy *vis-à-vis* the press.²⁶⁴ And yet that right is on unsteady ground, not least of all because the Supreme Court has been reluctant to commit to its existence, at least beyond judicial dicta. Whether the right to information privacy survives the reversal of *Roe v. Wade* is a question for another day.

Presidential conduct is a different matter. Neither the Privacy Act nor the right to information privacy has implications for President Trump, who is now out of office. His tweets and interviews about Page and Strzok's texts and affair likely would be shielded from liability because they bore some

255. *Id.* at 606 (Brennan, J., concurring).

256. *See id.* at 599–600.

257. *See id.*

258. *See generally* 562 U.S. 134 (2011).

259. *Id.* at 138.

260. *Id.* (quoting *Whalen*, 429 U.S. at 599).

261. *See id.* at 146.

262. *See* DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW (7th ed. 2020).

263. *See, e.g.*, Tucson Woman's Clinic v. Eden, 379 F.3d 531, 536 (9th Cir. 2004); Sheets v. Salt Lake Cnty., 45 F.3d 1383, 1386 (10th Cir. 1995) (finding that a woman's diary was private and should not have been made public after the close of a police investigation).

264. Katie Galioto, *Trump to Strzok & Page: You Should Have Used a Private Server*, POLITICO (May 23, 2019, 5:24 PM), <https://www.politico.com/story/2019/05/23/trump-strzok-page-private-server-1342846> [<https://perma.cc/6QAY-HVSS>].

connection to his official duties.²⁶⁵ A U.S. President's actions are immune from private suits if those actions fell within the "outer perimeter" of his or her constitutional or legislative duties.²⁶⁶ In President Trump's telling, the texts demonstrated misconduct of federal law enforcement officials, whose activities he has the power to oversee.²⁶⁷ True, the rallies were part of his presidential campaign, which is decidedly not part of his official business. Nonetheless, Trump surely would claim the mantle of immunity for privacy violations conducted while in office.

The stakes around presidential immunity are weighty and require careful thought. Wherever those arguments take us, the executive branch must now engage in the work of gaining the public's trust regarding the handling of personal data.

C. Restoring Public Trust

The Trump Administration smashed many norms and legal commitments, including the legal and moral commitment to keep records of people's personal information confidential. Of course, that was then, this is now. With a new administration comes a new opportunity to make clear that intimate privacy matters. The Biden Administration cannot undo the sins of the past. It cannot erase the damage wrought by the disclosure of Strzok and Page's texts to the media and followed by the presidential tweets, rallies, and interviews exploiting those texts and their extramarital affair. But the words and deeds of Biden Administration officials can make clear that personal data in their hands will be protected.

In ways large and small, the President and federal agencies—including the DOJ—should begin by signaling that they take intimate privacy seriously. Loudly and clearly, they should commit to protecting the privacy of people's data. They should make clear that intimate privacy is a foundational right that everyone deserves. President Biden has talked to the press about his concerns surrounding disinformation shared on social media.²⁶⁸ Part of that conversation involves the way cyber mobs circulate defamatory smears and privacy violations.²⁶⁹ I would like to see him recognize not only the harms of COVID disinformation, but also the harms of cyber-mob attacks on individuals. The Administration should make clear that whatever the privacy violations of the past, federal agencies will not now nor in the future show personal data of

265. *Id.*

266. Nixon v. Fitzgerald, 457 U.S. 731, 755–57 (1982); Clinton v. Jones, 520 U.S. 681, 685 (1997) (finding that President Clinton was not immune from sexual harassment lawsuit because it arose from his conduct while he was the Governor of Arkansas).

267. See Jong-Fast, *supra* note 51

268. Jennifer Elias, *Biden's Plan to Fight Online Harassment Could Set Up New Confrontation with Tech Companies, Experts Say*, CNBC (Nov. 10, 2020, 2:24 PM), <https://www.cnbc.com/2020/11/10/biden-will-take-a-close-look-at-online-harassment-of-women-setting-up-po-.html> [https://perma.cc/X2V4-ERXU].

269. *See id.*

individuals to the media without those individuals' meaningful consent, just as the Privacy Act requires.

The Biden Administration has tentatively begun an effort to recognize the harms of cyber-gender harassment, which is what Page experienced.²⁷⁰ It has been assembling stakeholders to discuss concerns about cyber-gender harassment and extremism online.²⁷¹ It should not just gather people together to discuss the problem in closed groups. It must bring its findings and concerns—as well as its commitment to intimate privacy—to the public. It must say loudly and clearly that it will handle people's intimate information with care.

Words are one thing, action is another. The Biden Administration could support efforts to amend the Privacy Act to include damages for emotional harm. It could support broader legislative efforts for comprehensive federal privacy legislation. And, in Page's and Strzok's cases in particular, the Biden Administration could acknowledge the harm that has been inflicted rather than fighting the lawsuits tooth and nail.

The bottom line is that the executive branch needs to restore the trust that the public has in government's handling of intimate information.

V. CONCLUSION

Privacy violations are damaging no matter the parties responsible. But when the government—especially the executive branch—violates the privacy of individuals, the damage is profound. Included is the public's willingness to trust the government with personal data. Now more than ever, the public must be willing to share their personal data with government agencies. A key task for the executive branch is to promise and demonstrate that it will protect everyone's intimate privacy. The public needs to get the message that their personal data in the hands of federal agencies is secure. My hope is that those privacy violations are not swept under the rug—but rather acknowledged—so that the process of inculcating trust begins in short order.

270. *Id.*

271. I was invited to participate in one of the Administration's cyber-harassment stakeholder meetings. CCRI President and my frequent coauthor Mary Anne Franks participated in other meetings.