The Contemporary Presidency:
Presidential Safety, Prosecutorial Zeal, and Judicial Blunders: The Protective Function Privilege

HERBERT L. ABRAMS
Stanford University

During the Clinton-Lewinsky episode of 1998, the independent prosecutor issued subpoenas to Secret Service agents to force them to testify. Presidential safety was at the heart of the debate that followed. The Treasury Department asserted a protective function privilege, whereby the agents could maintain confidentiality and thereby preserve the president’s trust and decrease his tendency to distance himself. The courts rejected the privilege on the grounds that there was no precedent, that the agents were federal officials with a duty to testify, and that no harm would follow the president. In their decisions, the courts blurred the margins of separation and devalued the opinions of the experts—the Secret Service director and all prior living heads of the agency. To safeguard future presidents, the best recourse for the nation is legislative enactment of a protective function privilege, which would preserve confidentiality between the president and the agents who guard him.

During the Clinton-Lewinsky scandal of 1998, the independent prosecutor demanded, for the first time in history, that Secret Service agents testify against the president whom they guarded. The director of the Secret Service contended that a “protective function privilege” exempted agents from such compulsion and that the violation of confidentiality involved might weaken the shield protecting the president. The judicial rulings that followed failed to reflect adequately the widely understood concept that societal decisions impinging on the presidency should generally err on the side of protecting the person and his office, unless he is manifestly derelict in fulfilling his constitutional obligations. This view recognizes both the great power and influence of the executive branch and its symbolic significance in the American system.

Herbert L. Abrams is a member in residence of the Stanford Center for International Security and Cooperation and professor of radiology at Stanford University. He is author of eight books (including The President Has Been Shot: Disability, Confusion and the 25th Amendment) and more than two hundred articles.

AUTHOR’S NOTE: My thanks to Dana T. Conley, my research assistant, who was very helpful in assembling some of the material on which this article is based, and to Barry O’Neill, who read the manuscript with a critical eye and many useful comments and suggestions.
Chronology

In January 1998, the Monica Lewinsky affair burst on the national scene. In rapid succession, Lewinsky presented an affidavit in the Paula Jones case; Linda Tripp told Kenneth Starr’s office that she had tape-recorded conversations with Lewinsky; President Clinton testified in the Jones suit; Attorney General Reno approved the expansion of Starr’s investigation, unaware that he had any connection at all to the Jones litigation; and Clinton denied press reports that he had had sexual relations with “that woman.” Starr quickly announced his intention to subpoena Secret Service agents in the White House detail and to question them about their daily observations as they worked next to the president (Farrell 1998).

Lewis Merletti, director of the Secret Service, then met with lawyers from Starr’s office. He had guarded Presidents Reagan, Bush, and Clinton, and he believed that Starr’s actions might endanger the safety and lives of the current and all future White House occupants. Forcing agents to testify might alter their relationship with the president and might well reveal some of their methods of protection, thereby rendering it easier for potential assassins to attack the president.¹ (U.S. District Judge Susan Webber Wright used this logic in rejecting the request of Paula Jones’s lawyers to subpoena the agents [Jackson and Timms 1998].)

On February 10, former agent Lewis Fox claimed in a television interview in Pittsburgh that Lewinsky had spent at least forty minutes in the Oval Office with Clinton sometime in the fall of 1995. Three days later, the Justice and Treasury Departments decided to allow limited questioning of Fox by the special prosecutor. This concession failed to satisfy Starr, who then subpoenaed an agent on active duty. In response, the Justice Department filed a sealed brief on February 21, claiming a protective function privilege that would defend agents from forced disclosure. This would formalize the long-standing tradition of confidentiality of the agents and would help assure the safety of the president (Buffalo News 1998).

During March and April, the pressure on the agents to testify became more intense (Cannon 1998). On April 3, Starr filed a sealed motion to compel. On April 28, he wrote to Charles Ruff, the president’s counsel, disputing the existence of a protective function privilege.² He was now asking the president to waive a privilege whose existence he denied (Ruff 1998).

The case was heard on May 13, 1998 in the U.S. District Court of the District of Columbia. The special prosecutor argued that the agents had a duty to testify (Yost 1998) and that there was no legal authority for them to refuse (Lardner and Miller 1998). The Secret Service contended that compelling agents to disclose their observations might distance the president from those who guarded him and thereby increase the hazard to his life and health (Baker 1998c). The positions were sharply etched and seemed unbridgeable.

---

¹ As the Starr prosecution unfolded, Special Agent Brian Cockell, the president’s chief bodyguard, was forced to relinquish his position in the glare of the publicity that destroyed the anonymity so important to his function.

² Independent counsel letter to Charles Ruff, April 28, 1998; see also St. Louis Post-Dispatch (1998).
The Response of the Courts

On May 22, Judge Norma Holloway Johnson rejected the Justice Department’s request for the privilege (Baker 1998b). Three Republican former attorneys general supported the decision, suggesting that the concerns about presidential safety were “hyperbole” (American Lawyer 1998, 90).

On appeal by Justice and Treasury, the three-judge panel of the U.S. Court of Appeals (Judges Williams, Ginsburg, and Randolph—all Republican appointees) embraced Johnson’s ruling on July 7, 1998. A request for reconsideration was rejected by the entire court.

The Treasury Department applied to the Supreme Court for a stay, which Chief Justice Rehnquist, acting for the Court, refused to grant (Associated Press 1998). On that day, three Secret Servicemen testified before the grand jury. Ultimately, Starr would compel testimony from over two dozen members of the White House protective detail (Denver Post 1998). Finally, on November 9, the entire Supreme Court reviewed the appeal, a majority agreeing with Rehnquist but with two dissenting votes and a strong minority opinion (New York Law Journal 1998).

Role of the Secret Service

Starr’s subpoenas were served against the backdrop of an agency with well-defined functions, guidelines, and traditions. Established on July 5, 1865 as the first general law enforcement agency in the federal government, the Secret Service was organized as a unit of the Treasury Department primarily to prevent the counterfeiting of U.S. currency (at the end of the Civil War, about one-third of all paper currency was counterfeit) (Melanson 1984). Its responsibilities were quickly expanded, and it soon became a combined CIA, FBI, and private army (Department of the Treasury 1991).

A protective function was initiated in 1894, when the service provided informal security to President Grover Cleveland and subsequently to William McKinley. Following McKinley’s assassination, the Treasury assigned the Secret Service to protect his successor, President Theodore Roosevelt, full-time, a function later continued for all presidents. In the thirties, the Service assimilated the White House police and the Treasury police force. Congress gradually narrowed its other powers, with the establishment of separate agencies for criminal investigation (the FBI) and foreign intelligence (the CIA).

Today, its primary mandate is to protect the president, the vice president, and their immediate families (Kurian 1998). It also safeguards former presidents and major candidates

---

3. Judge Johnson’s ruling, Washingtonpost.com, May 22, 1998. The court’s response was foreshadowed by an article on May 4, 1998 by Stuart Taylor, Jr., a conservative lawyer whose defense of the probity of Paula Jones was enough to impel Starr to invite him to join the prosecution team. Taylor (1998) claimed that no president would put his life at risk by keeping his protectors at an unsafe distance. How could Taylor possibly know that? In the view of Supreme Court Justice Breyer, distancing himself might be the only option for a president who wished to maintain confidentiality (see Breyer 1998, No. 98-93).

4. They were joined by a conservative southern Democratic former attorney general, Griffin Bell.


for the office, as well as visiting heads of foreign states. Intelligence collection and analysis are vital to the achievement of its goal and are assigned to the Office of Protective Research. Information on threats is acquired from White House personnel—phone calls or letters, for example—as well as from field offices, state and local agencies, other federal agencies such as the FBI and the CIA, and sometimes from foreign law enforcement groups. Predictive information, that depicting the intentions and objectives of individuals and groups, is considered most valuable and underlies the assessment of future threats against the president (Congressional Quarterly 1981-82).

The agency employs 2,100 plain-clothed agents, all with college degrees, and about 800 in uniform. Agents spend six or seven years in the field as recruits before entering the presidential detail, and they are then seasoned for three more years before being made responsible for a major presidential event. Their schedule may be grueling; when the president is abroad, an eight-hour shift may stretch to eighteen or twenty-four. Each agent returns to the Service’s facility in Maryland for intensive retraining after every six weeks on the job (Carney 1998). They work hard to establish an atmosphere of trust in the White House, a goal that may be difficult to achieve because the president has no voice in their selection. Central to a good relationship is their tradition of silence and confidentiality; it was deeply affected by the events of 1998.

The Courts’ Rulings

Three themes dominated the courts’ decisions.

Theme 1: The “protective function privilege” enjoys no support in law.

The courts held that the protective function privilege enjoyed no support in law and noted that it had not been recognized by any state. Furthermore, a consideration of privilege must be undertaken “in the light of reason and experience,” neither of which, Judge Johnson ruled, supported its recognition (New York Times 1998).

Privilege

Why was the concept of privilege so much in dispute? The term embraces the right to refuse disclosure in court proceedings without penalty. It covers a range of confidential communications addressed by federal and state courts: between lawyer and client; accountant and client; physician and patient; psychiatrist, psychologist, social worker, other psychotherapists and patients (Stone and Taylor 1993); clergyman and penitent; and others. Journalists (and book authors and lecturers at times) have also had grounds for refusing disclosure of confidential sources (or unpublished information) as long as their intent was to disseminate information to the public. The president has the right (under “executive privilege”) to safeguard documents and communications made in performance of his duties, and he is

7. There has been a good deal of confusion and rhetorical posturing on the issue of executive privilege, in large measure because of Nixon’s practices at the time of Watergate. To a lesser but significant extent, Clinton added to its bad name during the Monica Lewinsky scandal. The fact is that every president since George Washington has
immune from civil liability in deference to his position. Under the Fifth Amendment to the Constitution, the privilege against self-incrimination guarantees the individual the right to remain silent without penalty. He may refuse to answer questions or to provide testimony that may incriminate him, unless he is granted immunity from prosecution (Stone and Taylor 1993, 4-3, 6-3, 6-4, 9-3). Privilege is designed, among other things, to provide free communication between two parties by removing concern over compelled disclosure (Wigmore 1961). A possible injustice due to withholding some facts from a court is assumed to be counterbalanced by the benefits to justice and society of openness of a client to his attorney or a news source to a journalist (Strong 1992).

The protective function privilege supported by the Secret Service would protect information obtained by agents while on duty guarding the president (except for observations that might suggest the commission of a felony). Such a new privilege, which in the Supreme Court’s judgment requires consideration of historical roots, of prior recognition by states, and of public policy interests, may be created under Federal Rule of Evidence 501 if it “promotes sufficiently important interests to outweigh the need for probative evidence.” The public policy issue and the public good justifying the claim were firmly framed as the safety of the president. Starr contended it was overshadowed by the need to build his case. Judge Johnson’s strong concern was that the privilege had no history in federal or state law. “The absence of any state support for the privilege . . . militates against recognizing one” (New York Times 1998).

Precedent

Should a prior lack of recognition by the states have determined the decision? After all, no state has a president or a Secret Service with an overriding protective function. No privilege has ever had any history in state law or in federal law until it was claimed and tested. There had to be a first time. The journalist’s privilege came into being only in the 1970s, with a series of rulings supporting First Amendment protection (Stone and Taylor 1993, 8-12, 8-14). As recently as 1996, the Supreme Court affirmed a new psychotherapist-patient privilege because their relationship is based on an “imperative need for trust and confidence.” Courts have sometimes dismissed innovative legal approaches simply because there was no precedent for them. This privilege was “new” in the legal vocabulary but generally accepted in practice, never requiring articulation because no one had ever tried to breach it. The agency’s policy was based on a Secret Service memo drafted in 1910: “So far as the actions of the president and his family and social or official callers are concerned, the [Secret Service] men are deaf, dumb and blind” (St. Louis Post-Dispatch 1998). Secrecy existed from the time the service first assumed its protective role for McKinley, unstated, untried in the invoked executive privilege and that it is an important constitutional power when employed in the public interest. Eisenhower asserted the privilege on more than forty occasions (see Rozell 1999).

courts, implicit in the general understanding of the confidential nature of the material to which the agents were exposed. Precedent could not possibly exist if the issue had never been addressed (Anderson 1998).

The decision to compel the agents to testify was also a potential attack on lawyer-client privilege: Special Agent Cockell had been present in the limousine when Clinton attorney Robert Bennett had discussed many details of the president’s grand jury testimony (Lacayo 1998, 20-23). There was concern that Starr was using an indirect approach to attack a different privilege (Weiner 1998, A8), as he had attempted unsuccessfully following the suicide of Vince Foster (Coyle 1998a).12

Just as the attorney-client privilege is rooted in the belief that it will enhance trust, so, it was thought, would a protective function privilege promote trust and thereby safeguard the president (Coyle 1998b; Merletti 1998).

Theme 2: National security: Is the president’s safety from assassination affected by forcing the agents to testify?

Judge Johnson claimed to have relied on “reason and experience” in reaching her decision. Yet, the knowledge of threats to the life of the president—the assassination attacks on Lincoln, Garfield, McKinley, Roosevelt, Truman, Kennedy, Nixon, Ford, Reagan, and Clinton—surely represented a huge reservoir of “experience” that suggested powerfully the need to emphasize safety and protection. There was no constitutional prohibition on defining a protective function privilege, nor was there anything in common law that would preclude its recognition.

At the heart of the dispute lay a profound difference in the assessment of the threat to national security—or, specifically, to the life of the president—that inhered in the forced disclosure of his most private comments and activities. Secret Service Director Merletti contended in his brief that the agents must be close to the president if he is to be protected; to be close, they must “enjoy his unqualified trust.” There is no substitute, he said. If the moment of danger arrives, the agent may have to move the president bodily—place his hands on hips or shoulders—so as to direct him away from an assassin’s knife or bullet. He may have to shift his travel plan, restrict him from leaving his limousine until it is safe, and replan his travel route if required (Merletti 1998, 13). Will any president accept such intrusive behavior absent the intimacy that depends on total discretion?

Judge Johnson was not convinced that compelling Secret Service personnel to testify before a grand jury would place Presidents in peril, that a President would put his life at risk . . . . The President has a very strong interest in protecting his own physical safety and would not “push Secret Service agents away if he were acting legally” (Washington Post 1998), regardless of whether they might be forced to disclose.14

12. Foster was the assistant counsel to President Clinton and a personal friend.


14. Forced disclosure of material considered confidential by one or more parties may have a large impact, whether for good or ill, perhaps beyond Judge Johnson’s awareness. The information available to the Secret Service Office of Protective Research from various sources has diminished sharply since the introduction of the freedom-
The court of appeals, on July 7, 1998, agreed that the safety of the president was important to the nation. But it alleged that the Secret Service had not shown with “compelling clarity” that failure to recognize the privilege might jeopardize the protection of the president. It held that Merletti’s misgivings rested on “vague fears,” based on “speculation.” The court noted that confidentiality agreements were not a condition of employment and implied that the subject was consequently not relevant (Williams, Ginsburg, and Randolph 1998b).

At the highest level, Rehnquist’s rejection of the Treasury’s application for a stay was based on his conjecture that the agents’ forced disclosure of private presidential speech or action in the Oval Office, in his bedroom, in his limousine, or in his interactions with foreign leaders in Washington or abroad would not affect the president’s “relationship with his protectors in the future” (Associated Press 1998).

These three opinions disregarded, ignored, or minimized the appraisals of the professionals in the Secret Service (Bedard 1998, 5). They were based on the premise that a president—or any one of us—would trust and permit a potential stool pigeon, informer, human “bug,” squealer, snitch, or wiretapper to observe virtually every moment of our waking lives and to hear conversations with our family or guests that might abut on private or policy matters, even if we knew that he or she could be forced by a relentless prosecutor to disclose behavior that we might wish to conceal. Judge Johnson had held that a president would only “push away” the agents if he were acting illegally (Washington Post 1998). Justice Breyer, in contrast, noted in his dissenting Supreme Court opinion that without the privilege,

> a President could not count on privacy. . . . There may well be conversations—concerning say, politics or personalities—which a President reasonably would not want divulged . . . the only way he could assure privacy would be to create a physical distance between himself and his Secret Service staff. . . . A delicate relationship exists between the President and his protectors, one that may be particularly sensitive to the trust that comes from knowing that what the agents learn in the course of their duties will never be made public.16

**Might a President Distance Himself from His Agents?**

The newly elected president may be profoundly uncomfortable with the tight envelope that surrounds him. The agents intrude on his privacy, see risks where none exist, and constantly hamper his ability to interact with the voting public who selected him to lead. For Harry Truman, “the feeling of being constantly under guard grated on him. He would

of information statute. Those who threaten the president are commonly mentally unstable individuals. Availability of their institutional records promptly would be of special value when the president is traveling at home or abroad. But neither hospitals nor others who believe that government agencies cannot maintain confidentiality (banks, telephone companies) are willing any longer to be as responsive as they once were. See “Treasury Department Report on Protective Intelligence, Historic Documents of 1981,” Congressional Quarterly (Washington) 1982, p. 360.

15. Secret Service Director Merletti testified before the House Appropriations Committee that assassination attempts are now a reality. He pointed to the recent attack (February 9, 1998) on Georgian President Eduard Shevardnadze with more than fifteen terrorists armed with rocket-propelled grenades, antitank weapons, hand grenades, and AK-47 assault rifles. They also carried cell phones, radios, and video equipment, he said. The president’s car was struck by two rocket-propelled grenades and thrown into a tailspin for 150 yards (see Bedard 1998).

much have preferred less security than more.” After the attempt on his life on November 1, 1950 by Puerto Rican nationalists, he complained that he “was really a prisoner now” (McCullough 1992).

Judge Johnson had declared that the president would never distance himself or “put his life at risk, even if engaged in personally embarrassing acts” (Washington Post 1998). Judge Johnson’s certainty about how a president would behave to avert humiliation was totally unsupported by reference or history. Indeed, the entire case under review was an outgrowth of “personally embarrassing acts,” which were powerful enough to push a president to lie and thereby to risk his entire political life. Before Clinton, there were Grover Cleveland, McKinley, Roosevelt, Eisenhower, Kennedy, and Johnson, all with past or current indiscretions and so-called embarrassing acts. More to the point, as we view our recent presidents, they have all told lies to the public, some supposedly in the national interest, most designed to prevent mortification and/or to deceive the public. Eisenhower in the U-2 incident; Kennedy with his Addison’s disease (adrenal insufficiency); Johnson in the Vietnam War; Nixon in (1) the secret bombing of Cambodia and (2) in Watergate; Ford with regard to the meeting with Haig on the Nixon pardon; Reagan in Iran-Contra and the “arms for hostage” trade; Bush in (1) declaring Clarence Thomas the “best qualified” person for the Supreme Court and (2) in his claim that he was “out of the loop” on Iran-Contra; and finally, in the present instance, Clinton in the Lewinsky episode (Pfiffner 1999)—all of these presidents were deeply concerned about disclosure of their untruths. They might well have separated themselves from their agents if it would have helped in maintaining the deception.

The courts ignored the general understanding that presidents would not have reached the White House unless they were risk takers. In office, they are always at risk, a hazard that they may ignore, belittle, deny, accept, or simply fail to perceive. Moreover, even the court of appeals specifically observed that “a simple desire for privacy . . . might impel a President to distance himself from Secret Service agents” (Williams, Ginsburg, and Randolph 1998b).

Former president George Bush wrote a strong letter in support of exempting the agents from testifying:

If a President feels that Secret Service agents can be called to testify about what they might have seen or heard, then it is likely that the President will be uncomfortable having the agents nearby. . . . I allowed the agents to have proximity first because they had my full confidence and secondly because I knew them to be totally discreet and honorable.17

President Ford, however, without discussing the potential consequences, believed that “any officer of the federal government should be required to testify in a criminal proceeding.” He differentiated “very strongly in the case of a civil proceeding. In that kind of a legal action, I don’t think the Secret Service has to testify.”18 President Carter supported his view.

Trust is central to the stability of the fine-grained interaction between the president and his protectors. On Sunday, December 2, 1944, four months before his fatal stroke, President Franklin D. Roosevelt (FDR) drove Lucy Mercer Rutherford from his Warm Springs

retreat part way to her home in Aiken, South Carolina. She had been his great love of an earlier period. He drove carefully for about an hour and reached the point where her car was waiting, then said goodbye. As she left, a Secret Service agent from the car in back joined the president. The visit had provided great pleasure to an enfeebled FDR, but it would never have taken place had he felt more remote from the agents or believed that they might betray his confidence. “The President trusted Mike Reilly (chief of the White House detail) more than most of his cabinet” (Bishop 1974).

Does Distance Matter?

While Roosevelt’s trust and closeness were comforting to him, is there any evidence that they enhanced his safety? Does distance matter?

Shortly before the killing of President McKinley in Buffalo in 1901, Agent Ireland, who was guarding him, left his side because John Milburn, the head of the Pan American Exposition, wished to be next to the president. Within minutes, the assassin shot the president point-blank. The killer had approached the platform with the gun in his hand supposedly hidden by a handkerchief, but clearly visible (Johns 1970). An agent standing at the president’s side would have had an excellent chance of disrupting the assassin’s plan (Breyer 1998).

On that calamitous day in 1963 when President John Kennedy was visiting Dallas, he insisted on the removal of his guards from the running boards of his car just before one or more rifle shots pierced his skull. Clint Hill, the agent who jumped on the trunk of Kennedy’s limousine as the shots rang out, believed strongly that he might have altered the outcome of the attack if he had been on the bumper—either deterred it or taken the shots himself (Broder and Labaton 1998). A subsequent analysis of the event and of the trajectory of the bullets suggested that the agents in place might have frustrated the assassin (Merletti 1998).

In September 1975, President Gerald Ford was attacked by a woman with a loaded semiautomatic pistol. The agent standing next to him grabbed the weapon with one hand and her arm with the other. As other agents closed in, they surrounded the president and moved him away (Shabecoff 1975).

When John Hinckley fired at President Reagan in March 1981, Agent Jerry Parr threw the president into the limousine and fell on top of him, while Agent Tim McCarthy, who had interposed himself between the president and the assassin, was shot in the abdomen, probably saving the president’s life. As the car moved quickly away, the president complained of chest pain and soon began to cough up blood. Parr ordered the driver to the Emergency Room of the George Washington University Hospital. Twenty more minutes of continued massive bleeding into his chest might have sent the president into shock. Had he been standing one foot to his left, in the place of James Brady, his communications director, he would have suffered irreversible brain damage (Abrams 1994, 124). In later years, Nancy Reagan (1991) would acknowledge, “There was kind of an unspoken agreement that none of us would let the public know how serious it was and how close we came to losing him.”

Later, Parr would note that during the election campaign of 1980, Hinckley was stalking Jimmy Carter. In Dayton, Ohio, on October 2, an ABC video camera caught him less than six feet from Carter. Hinckley said that he was dissuaded from shooting Carter because
the Secret Service entourage was protecting him so closely (my emphasis). A few days later he moved onto Nashville, Tennessee, where Carter had planned a speech. Unable to shoot the president, he tried to catch a plane for New York but was caught with three guns and ammunition in his bag and arrested (Abrams 1994, 25).

It is impossible to protect the president fully from a determined, well-equipped, well-organized assailant. It is possible, however, to cut the risk. Agents are trained to interpose themselves as “human shields” between the president and an assailant; they cannot do so without proximity. “The Independent Counsel’s motion to compel,” Merletti (1998) concluded, “represents a threat to the safety of this and future Presidents,” which a protective function privilege would neutralize.

Is the Danger Real?

Bullets have reversed the electorate’s choice four times in our history, with the assassination of 10 percent of all presidents ever elected to office (Abrams 1995b). All told, there have been at least twenty-two attacks on presidents. The climate of violence persists, and the dangers to the president are accelerating. On January 16, 1995, his life was threatened; between January 11 and January 17, 1994, he was stalked; on September 12, 1994, a small plane crashed into the White House; on October 29, 1994, the White House was sprayed with bullets; on December 17, bullets struck the White House again (Abrams 1995a). In July 1998, when two security guards were shot and killed at the Capitol, Clinton was the initial target. The Secret Service had maintained a file on the killer since April 1996 (Weil 1998).

The court of appeals noted that the protective function privilege would have its greatest effect inside the White House, while “the greatest danger to the President arises when he is in public” (Williams, Ginsburg, and Randolph 1998a). Is it possible that the judges were unaware of the attempts to scale the White House fence, or of the stolen Cessna that crashed into it, or of the multiple rounds fired at the White House? Presidents Hoover, Carter, and Reagan had visits in the Oval Office by men unknown to them; in Reagan’s case, the visitor was on the Secret Service’s list of dangerous persons and had a history of mental disorders (Melanson 1984). Pennsylvania Avenue has now been closed for the first time in our history because of the Secret Service’s concern about the threat of a truck bomb (Purdom 1995). If a president has to be moved or needs bodily protection within moments of a dangerous incident, his guards must be acceptably nearby and trusted. The attempted assassination of President Truman was prevented in 1950, but only with Agent Leslie Coffelt’s loss of his life and the wounding of other officers (McCullough 1992). Assassination attempts such as those on President Ford have been forestalled because of close human intervention (Merletti 1998, No. 98-148).

The judiciary’s dismissive attitude toward the professional judgments of the trained experts responsible for the president’s safety dismayed all nine living prior heads of the presidential protective division. The court’s rejection of the claim, if not reversed, “would lead inexorably to the successful assassination of another American president in our lifetime,”

20. In a thoroughly misleading book, which defends and justifies virtually every one of Starr’s actions, Susan Schmidt and Michael Weisskopf (2000) repeatedly intimate that Merletti’s assertion of the protective function privilege was a response to Clinton’s demands. “Starr’s staff had heard that the President had pressured his hand-picked
they said (Baker 1998a, 9). Former agents who reviewed Starr’s demands considered them “unprecedented,” a “witch-hunt” (Dorman 1998), an action that would render maximum protection “impossible” (Farrell 1998). A former counsel to the House of Representatives asserted that the security of the presidency is far more important than whatever information Starr might acquire from the subpoenas of the agents, beyond the formal records of White House comings and goings already in his hands (Jackson and Timms 1998). The prime minister of Canada, shortly before a visit to the United States, declared that he would rather do without Secret Service protection than expose himself to the possibility that the agents might be compelled to testify about his confidential speech or actions (Klaidman and Isikoff 1998).

In Justice Breyer’s (1998) words, “the law should take special account of the obvious fact that serious physical harm to the President is a national calamity” and should recognize “a special governmental privilege where needed to help avert that calamity.”

Theme 3: Agents are law enforcement officers and must report “criminal activity.”

A third major assertion of the courts was that Secret Service agents are law enforcement officers and must under the law report criminal activity “unless the Attorney General directs otherwise” (Washington Post 1998). But the president’s life with his wife, his children, his friends, or even foreign dignitaries should never be subject to disclosure without his permission. Never before had agents been called on to serve as witnesses against a sitting president on what they had seen or heard in the course of their duties. (In the Watergate hearings, they were asked to testify only about the installation and operation of the tape-recording system in the Oval Office.) A hostile prosecutor—if he can compel testimony—can demand virtually any information on the grounds that it might be associated with a felony. The court accepted Starr’s mischaracterization of the agents as “cops on the beat,” or nondescript federal employees, rather than specially focused protectors of the president, trained to respect confidentiality. Even if the interpretation had merit, the asserted protective function privilege contained an exception whereby an agent who saw or heard conduct or statements that were clearly criminal must report them and/or testify about them. Starr claimed in the face of conflicting statements from the Secret Service that a waiver by the president of the “protective

Secret Service Director, Lewis Merletti, to keep his employees from talking. The tip came from a source connected to the Secret Service’s top command” (p. 131). “The incident would have occurred a few weeks before Monica Lewinsky burst onto the world stage” (Had occurred? Might have occurred?). “The suspicion that Merletti had acted because of political pressure from Clinton . . . hardened the resolve of Starr’s prosecutors” (p. 132).

The source of this tip from the Secret Service’s “top command” is never identified. “Their informant refused to go on the record for fear of reprisals” (p. 137). Among all the subpoenas handed out (agents, White House staff, the president, etc.), this important source, who might have pinned down the “collusion” between the president and Merletti—if it ever existed—was never subpoenaed. Under “notes,” on page 291,

the source said he heard the Oval Office story described in the presence of Merletti. In an interview for this book (with Schmidt), Merletti vehemently denied he had received any directive from Clinton. “There is absolutely no truth in that whatsoever. There is not one shred of truth in it,” he said. “Throughout, the Secret Service stood on principle.”

Thus, if a reader goes to the notes in the back of the book, he or she will find for the first time the “vehement” denial by the only person really in a position to know, that is, Merletti. If Starr believed in the political motivation, why didn’t he subpoena Merletti and force him to testify, as he had done with so many other agents?

Schmidt’s account has been used as a source for labeling the protective function privilege a “fanciful legal gambit.” “Starr had reason to believe that this was undertaken on Clinton’s specific instruction,” according to Newsweek, further spreading and endorsing the unsupported allegation (see Ferguson 2000).

function privilege” would “eliminate the Secret Service’s concerns about presidential safety.”

This was an extraordinary disconnect. It is not the president who will have failed in his job if an assassin murders him but rather the Secret Service agents. They made the most powerful case for preserving the confidential relationship with the president. Any compromise of confidentiality would make far less certain a president’s willingness to afford the “complete and unquestioned access and proximity on a twenty-four hour a day, 365 day a year basis” that the Secret Service design plan for protection requires (Nesbitt 1998).

Have We Learned Any Lessons?

Lesson 1: If ever an Independent Counsel Act is reenacted, the duties, responsibilities, powers, and limitations of the prosecutor must be clearly defined, together with time and budget limitations.

A determined, ideologically driven, zealous prosecutor was able to use and misuse his power so as to virtually bring down a popularly elected president. In pursuit of a president whose foolish and improper behavior had already become mortifyingly public, he so engaged the executive branch as to paralyze both the president and the Congress. What was gained by opening the Secret Service to the demands of special prosecutors and grand juries? Two dozen Secret Service agents were brought in to testify, none of whom had seen the president and Ms. Lewinsky in a compromising position. Virtually all of their most important information was already in the special prosecutor’s hands from the White House records of comings and goings. Starr used their testimony to confirm the presence of Lewinsky in the president’s office at various times (he said “alone,” while Clinton claimed that the door was always ajar and therefore they were not alone) and to support the claim that they had developed “cover stories.” Even if the agents had seen “improper acts,” that would hardly have been illegal.

The court allowed the independent counsel to delay the business of the nation because of misperception and misunderstanding of the unique and awesome demands on the president. Occupying the most powerful position in the world, he is constantly subject not only to the need to make thoughtful policy decisions but also to interact with a host of constituencies—the White House staff, the cabinet, the Congress, the media, the public, the international community, visiting foreign leaders, the party leaders. The court’s refusal to delay the civil lawsuit of Paula Jones was based at least in part on the supposition—articulated by a caustic and arrogant Justice Scalia—that if Clinton had time to play golf on occasion, he could surely afford the few hours required to give a deposition. In their constricted approach to the issue, they refused to consider the potential impact on the country.


23. When the Republican House moralizers debased the Constitution by elevating personal sexual behavior and adultery to the level of a high crime or misdemeanor against the state requiring impeachment, what was at stake was not a glandular Bill Clinton but the presidency itself; not the Christian Coalition running the Congress but the separation of powers; not the thwarting of the people’s electoral decision but the attack on our constitutional form of government. Starr justified his probe into the depths of Clinton’s sexual adventures by claiming he was investigating perjury. Unless Clinton were found guilty, the House prosecutors said that his perjury would be a model for others to follow. But President George Bush had already provided a model when he pardoned Caspar Weinberger, an admitted perjurer, in the wake of Iran-Contra, as well as five others who lied to Congress.
Lesson 2: The courts should recognize the intensely demanding operational character of the presidency and take no action that would interfere with his discharge of his duties to the nation.

The courts’ belief that the speech and action of a president with his friends, family, or diplomats required less protection and privilege than any individual’s comments to a lawyer, social worker, spouse, journalist, accountant, and others represented a failure of judgment. It was the presidency, not the president, that required consideration. The arrogance of the courts was such that they placed their knowledge of how best to protect the president above that of those professionally charged with its day-to-day and year-to-year implementation. They rejected the congressional injunction that the protection of the president is the responsibility of the executive branch. Future presidents will surely understand that their constant companions may be forced to betray them when the time comes; their suspicions may interfere with the trust essential for effective protection.

Lesson 3: Rather than impinge on executive branch responsibilities such as the protection of the president, the courts should understand the need not only to safeguard the president’s time but his life as well.

In a destructive way, the drawn-out spectacle illuminated the importance of presidential leadership. Clinton, preoccupied with his scandal, the attacks on his person, and the extraordinary embarrassment of his wife and daughter, was unable to grapple with the country’s problems. Ultimately, the invasion of the executive branch by the judiciary produced the gravest injury to the public who had chosen Clinton to lead, no matter how they reveled in the ornate language of the Starr report.

Concluding Comments

The courts failed in their duty to assess the dimensions of the threat to national security and the life of the president implicit in the refusal to protect agents from being forced to inform on their protectee’s private words and actions. They ignored the safety concerns without adequate exploration of our history of assassination, of the consequences of a president’s loss of confidence in his guards, and of the likelihood that it might affect proximity. A great strength of the American system inheres in the separation of powers and the checks and balances that weigh on the executive, the legislative, and the judicial branches. The protection of the president has always been the purview of the executive branch. Starr managed to insert the judiciary into a series of decisions that impinged on the separation of powers and the traditional obligations of the Treasury and the attorney general. The courts blurred the margins of separation by their decisions. In the attorney general’s words, “The court has substituted its judgment for that of the agency charged by the Congress with protecting the presidency” (Fireman and Royce 1998, July 15).

Early in February 1999, shortly after Starr first subpoenaed the Secret Service, Justice Department and Treasury Department lawyers began drafting legislation for the Congress to consider that would prohibit prosecutors from repeating Starr’s assault. The agents would be protected from testifying about political and personal information obtained while guarding the president.
Not until July 13, 1999 did their effort surface in a more public form when Senator Patrick Leahy introduced Bill S.1360, the “Secret Service Protective Privilege Act of 1999,” into the Senate.\textsuperscript{24} Subsequently, on September 16, it was included as a provision of a large anticrime package filed by Senators Tom Daschle and Leahy. The bill exempted Secret Service agents from testifying as to what they had seen and heard while on duty with the president. The exceptions were crimes committed within their sight and hearing, on which they were required to give testimony. Senator Orrin Hatch, chair of the Senate Judiciary Committee, promised to work with Leahy on the legislation (Greenwald 1999), but it remains a part of the committee’s unfinished business.

Following the attack on President Reagan by John Hinckley in 1981, the Treasury Department conducted an extensive review of the performance of the Secret Service. The report made the incontrovertible point that “a democratic system which values an orderly transfer of authority through free elections cannot allow the results of these processes to be redirected or reversed by violence.”\textsuperscript{25} The Secret Service surely knew better than Judge John Johnson or anyone in the judicial branches the dangers to the life of the current and future presidents that might reverse the will of the electorate. A statute responsive to their request would help protect all future presidents from the likelihood of an overturn of free elections “by violence.” It would establish an avenue of escape from the dilemma created by court decisions that preempt the executive branch’s protective function. The Congress must take it upon itself to defend the presidency of the future from prosecutorial zeal and judicial myopia.

References

American Lawyer. 1998. Former attorneys general offer pointed advice, June 1, 90.


Transcript on file.