Affirmative: Justice

By Steven Errico

Resolved: In democratic elections, the public's right to know ought to be valued above a candidate's right to privacy.

The purpose of this case is to point out the necessity of knowing who it is we’re voting for. This case focuses specifically on the presidential elections. Without knowledge of the character, health, history, etc. of a candidate, we’re making a very risky gamble on the next four years of our nation’s fate. In the same way that you really want to get to know someone before you marry them, we really ought to be able to get to know the person we’re asking to run our country.

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Affirmative: Justice

The framers of the United States Constitution were very concerned with establishing a just society for the citizens. The only way to maintain a just society is to ensure that those who govern us are capable of carrying out their duties fairly. Join me in affirming the resolution; Resolved: In democratic elections, the public's right to know ought to be valued above a candidate's right to privacy.

DEFINITIONS

Right to Know

The American Heritage Dictionary “Right to Know” <https://www.ahdictionary.com/word/search.html?q=right+to+know>

Of or relating to policies and laws that make some governmental records and other information available to a person who can demonstrate a right or need to know the contents.

Right to Privacy

Merriam-Webster Legal “Right of Privacy” <https://www.merriam-webster.com/legal/right%20of%20privacy>

**:**the right of a person to be free from intrusion into or publicity concerning matters of a personal nature

VALUE: Justice

Definition

Black’s Law Dictionary “Justice” <https://thelawdictionary.org/justice/>

Protecting rights and punishing wrongs using fairness. It is possible to have unjust laws, even with fair and proper administration of the law of the land as a way for all legal systems to uphold this ideal.

Reason to Prefer: Moral Obligation of Government

The duty of government is to enforce justice. It is the duty of the people to elect leaders who will enforce justice. We must therefore evaluate how each side of the resolution impacts the ability of both parties to do their respective jobs.

CONTENTION 1: Informed voters elect good presidents

Voters can’t weed out compromised candidates without personal information

Transparency.org 2019 (Voices for Transparency deals with the world of corruption.) “Costa Rica: Corruption and the Public’s Right to Know <https://voices.transparency.org/costa-rica-corruption-the-publics-right-to-know-98051911b07b>

The Italian philosopher Norberto Bobbio conceived democracy as “the government of the public in public”

Citizens have an essential right to know what their representatives do with the public resources they receive. Public services provided by government and funded by citizens are a core function of democracy.

To ensure decision-making is in the public interest, and not guided by personal or private interests, a system of checks and balances is necessary. Citizens have the right to challenge or debate how public resources are spent and hold government actors accountable if those resources are not used efficiently to serve the common good.

Application: Presidential Health

La Times 2016 (Matt Pearce is a reporter for the Los Angeles Times) “How much do presidents and candidates need to tell the public about their health?” <https://www.latimes.com/nation/la-na-presidential-health-disclosure-20160912-snap-story.html>

Without a legal mechanism to force disclosure for such records, “you really need the public to hold them accountable,” said Robert Streiffer, associate professor of bioethics and medical history at the University of Wisconsin-Madison.

But the bar for disclosure should be high, Streiffer said. He defined the threshold as “a condition that has a significant chance of seriously undermining the person’s ability to perform the core competencies of the presidency if they are elected.”

Former White House physician Lawrence C. Mohr said that althought “the American people are entitled to know the health status of their president and presidential candidates ... the release of any medical information has to be the decision of the candidate and not the doctor.”

If disclosure happens, Mohr said, “the information should be accurate, it should be complete, it should be timely, and it should include whatever medicine is being prescribed, and the physician should offer some prognosis about how long it will take to get well.”

Mohr, who was a White House physician during the Reagan, George H.W. Bush and Clinton administrations, said public understanding was also an important part of disclosure.

“Just because a president has an illness doesn’t mean that’s a disqualifying factor if that illness can be effectively treated,” Mohr said, pointing to Roosevelt’s long years in office.

The things that are really important, Mohr said, are not the name of the illness or the specific diagnosis, but whether the president can think clearly, act appropriately and communicate effectively.

Impact: Personal issues affect governing ability.

CONTENTION 2: Keeping candidates’ information private harms the rights of the people

Secrecy breeds corruption

Earl Warren 1974 (From the American Bar Association Journal.) “Governmental Secrecy: Corruption’s Ally” [www.jstor.org/stable/25726734](http://www.jstor.org/stable/25726734)

When secrecy surrounds government and the activities of public servants, corruption has a breeding place. Secrecy prevents the citizenry from inspecting its government through the news media. The minimum amount of secrecy needed for the proper operation of government should be fixed by law, and no secrecy beyond that point should be countenanced.

Application: Joe Biden and Donald Trump

The Nation 2019 (Author Lev Golinkin is the author of A Backpack, a Bear, and Eight Crates of Vodka, Amazon’s Debut of the Month, a Barnes & Noble’s Discover Great New Writers program selection, and winner of the Premio Salerno Libro d’Europa. Golinkin, a graduate of Boston College, came to the US as a child refugee from the eastern Ukrainian city of Kharkov (now called Kharkiv) in 1990. His writing on the Ukraine crisis, Russia, the far right, and immigrant and refugee identity has appeared in The New York Times, The Washington Post, the Los Angeles Times, CNN, The Boston Globe, Politico Europe, and Time (online), among other venues; he has been interviewed by MSNBC, NPR, ABC Radio, WSJ Live and HuffPost Live.) “Joe Biden’s Conflict of Interest on Ukraine” <https://www.thenation.com/article/archive/joe-biden-ukraine-burisma-holdings/>

The vice-president’s son landed a questionable – and lucrative – sinecure in an economically unstable nation that played a key role in US foreign policy and was heavily-dependent on Western aid. This created a conflict of interest ipso facto, regardless of intentions. The fact Joe Biden doesn’t see a problem with it is a concern, especially considering Hunter – who was just reported to be a major investor in Chinese [surveillance technology](https://theintercept.com/2019/05/03/biden-son-china-business/) – continues engaging in murky overseas ventures.

In reporting on the *Times’* story, [some](https://www.motherjones.com/kevin-drum/2019/05/team-trump-pressures-ukraine-and-william-barr-to-investigate-joe-bidens-son/) analysts [dismissed](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjE3uGU_5fiAhUrqlkKHalKAzIQFjAAegQIARAB&url=https%3A%2F%2Fwww.washingtonpost.com%2Fopinions%2F2019%2F05%2F08%2Fwhy-joe-bidens-alleged-ukraine-conspiracy-doesnt-hold-up%2F&usg=AOvVaw2y-Vl5kdiYlaCVemMGAIKx) the conflict of interest inherent in Hunter Biden’s Burisma position, devoting a sentence or two to acknowledge it wasn’t a good idea, before moving on to criticize the *Times* for running the piece in the first place. That’s wrong. If coverage of the Trump clan’s numerous imbroglios is beneficial to the public, a story about the man who may well become the next president, falls in the same category.

Biden, whose appeal stems from standing up for the common man, should address the issue, including pledging his son will disentangle himself from questionable investments that may impact foreign policy. Doing so will deprive the White House from claiming the two men are the same, and put an end to this strange affair.

Impact: Both candidates’ personal affairs are relevant to their ability to govern fairly.

Negative Counter-Brief: Justice

In order to counter this affirmative case, you will have to argue for a balanced view of justice that takes into account both sides of the equation. Your best option against the affirmative side of this resolution is a balanced negative where you argue for a balance between publicity and privacy. Several pieces of evidence to this effect can be found below.

Further arguments to counter this case can be found in my negative “Justice” case if you need more than what I’ve provided below.

Privacy is necessary for a functioning democracy

The Atlantic 2015 (Author Lawrence Cappello is a doctoral candidate in history at the Graduate Center of the City University of New York and a lecturer at Queens College.) “Can Government Function Without Privacy?” <https://www.theatlantic.com/politics/archive/2015/11/can-government-function-without-privacy/413419/>

To be sure, transparency in government is essential to any liberal society. But privacy is also a necessary component of state function, and not just the kind of privacy that deals with national security. For the same reasons that individual citizens need privacy so that they can better formulate ideas, assess their surroundings, and respond to problems intelligently, so too do government officials need privacy to reflect on the long-range effects of their policies and to engage in frank discussions aimed at finding intelligent solutions.

Consider also that the Constitution of the United States was written behind closed doors, with its authors sworn to secrecy, and that the notes of the debates were not released for 50 years. Alan Westin, perhaps the most influential privacy scholar of the 20th century, once argued that “if the [constitutional] convention’s work had been made public contemporaneously, it is unlikely that the compromises forged in private sessions could have been achieved, or even that their state governments would have allowed the delegates to write a new constitution.” This understanding of privacy speaks to the importance of confidentially for certain democratic processes *and* confidentiality about those processes afterwards (for a reasonable period).

President Eisenhower expressed similar sentiments in a 1954 memo rejecting Senator Joe McCarthy’s subpoena for various documents, claiming it was “essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid in advising with each other.” When the Supreme Court ordered the release of Nixon’s secret recordings 20 years later, the justices made a point of noting that this precedent of executive privacy remained valid.

The release of Clinton’s emails raises serious questions about how this perception of organizational privacy is changing. Granted, the fact that her emails were kept on a private server instead of a government one (where they would have been immediately forwarded to the State Department archive) makes her case somewhat slippery, and has led to allegations of illegalities still being investigated. It should also be noted that she herself released a large number of those emails, albeit under considerable pressure.

But still, something has changed here. Communications technology has evolved to a point where vast amounts of official correspondence can instantly be shared with the public at large—a public that doesn’t need to go to D.C. or pour over government volumes, but can simply access that correspondence from a smartphone. No Constitutions were found unwritten after those emails were read, yet their release to the public represents a benchmark in the history of American privacy.

Among the most vocal of those who filed FOIA requests for Clinton’s emails was *Vice* reporter Jason Leopold, who identifies as nonpartisan. He says he filed the requests because he “wanted to gain insight into how she conducted herself as Secretary of State, and how that would inform the public as to how she may be as president.” Americans do need people like him to continuously apply pressure, but the logic behind his justification, and that of many Americans weighing in on the email scandal, demonstrates a privileging of disclosure over privacy.

Most modern privacy law hinges on a key principle of whether an individual or institution had a “reasonable expectation of privacy.” Whether or not Clinton had one in this case, because she abandoned the State Department servers for her own, can be argued either way. But the people who emailed her, from the unsympathetic Lanny Davis to the calculating Sydney Blumenthal, all certainly had reason to believe that their conversations would not be subject to public scrutiny—at least not until a few decades had passed. The danger here is the potential for a “chilling effect” that makes politicians less likely to speak candidly, grow even more formalized, and pursue new and potentially dangerous avenues of secrecy that move further away from an appropriate privacy balance.

But, again, this may all be for the best. If the Snowden revelations proved anything, it is that technology has provided modern governments with unprecedented mechanisms for invading the privacy of their citizens. So perhaps it is fair that technology coupled with Freedom of Information Act (FOIA) requests can also serve as a great equalizer. But if privacy problems are indeed among the foremost concerns facing the nation, they should be viewed in their proper context—and right now they’re not.

Not all secrets are nefarious. It’s not that cut-and-dried: Secrets can be incredibly useful to democratic government. They’re what created the Constitution. And what could be more American than that?

Case by Case Basis

National Conference of State Legislatures 2018 (Nicholas Birdsong is a policy associate with NCSL’s Center for Ethics in Government.) “Yes, No, Maybe So” <https://www.ncsl.org/bookstore/state-legislatures-magazine/yes-no-maybe-so-do-legislators-have-a-right-to-privacy.aspx>

Officials have challenged various financial disclosure requirements on privacy grounds for decades. Judges have considered claims that the laws unconstitutionally intrude into private affairs more than is justified by any public purpose. Critics have also argued that mandatory disclosure rules improperly restrict the right to seek or hold office when they exclude violators from the ballot. Some have further asserted that intrusive ethics laws discourage qualified candidates from running or serving in the legislature.

While courts have largely acknowledged that a right to privacy extends to legislators, that right is generally weighed against the state’s interest in a transparent government. Rules that exclude candidates from the ballot for withholding information have been found constitutional when they’re sufficiently tailored to achieve a legitimate state interest without unduly limiting the ability of candidates to run for office or for voters to be represented.

Although disclosure requirements generally have been upheld, overly broad statutes have been invalidated in a few cases. An ethics rule might be unconstitutional if the interest in privacy outweighs the government’s interest in exposing or minimizing possible conflicts of interest, such as when particularly intrusive requirements apply to family members, or if candidate-doctors are compelled to disclose sensitive patient information.

Some state constitutions have more robust privacy protections than others. Disclosure requirements may be permissible in one state but unconstitutional in another. However, no state can violate the privacy guarantees of the U.S. Constitution, which sets a sort of minimum threshold for how far these rules can go. As a result, financial disclosure laws must not violate either the federal Constitution or the constitution of the state in which the law exists.

Legislators have a right to privacy, but the constitutional protections only define the far boundaries of what is lawful. Within that wide range of what can be done, states take different approaches based on the demands of constituents and the cultures of individual states.

Counter Application: Genetic Privacy

The New England Journal of Medicine 2008 (Dr. Robert C. Green: Departments of Neurology, Medicine (Genetics), and Epidemiology at the Boston University Schools of Medicine and Public Health, Boston. Professor George J. Annas: Department of Health Law, Bioethics, and Human Rights, Boston University School of Public Health, Boston.) “The Genetic Privacy of Presidential Candidates” <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2925179/>

For the foreseeable future, the examination of thousands of genes in any genome is likely to result in large numbers of false positive findings, along with “incidental” findings of dubious clinical value.[5](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2925179/#R5) Thus, when sequence information about individual genomes becomes available, we will have to contend not only with the statistical issues of replication, effect size, and attributable risk but also with the specter of genetic information that is wrong or misleading.

Genetic information is easy to misinterpret and to misrepresent. Nonetheless, its scientific patina will encourage presidential campaigns to use it to reinforce existing prejudices. Therefore, we think future presidential candidates should resist calls to disclose their own genetic information. We recommend that they also pledge that their campaigns will not attempt to obtain or release genomic information about their opponents. Genetics experts, whether partisan or neutral, must be prepared to speak with the press to explain the nature of genomic information if and when it becomes public. Though it might be tempting to enact laws that would make it a federal crime to sequence a candidate’s DNA without consent, we believe that restraint by the candidates, coupled with education of the public, will be a more reasonable approach as we enter a medical future based at least in part on personalized genomics.

Using genetic information to disparage opponents has no place in presidential campaigns. Nonetheless, the threat of genetic McCarthyism provides us with an opportunity to engage in a public dialogue about the limitations and complexities of using genomic information for decisions about life and health — including voting for our president.

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